Supreme Court, U.S.
FILED

961504 MAR 21 1997

No.

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CAROL B. HUBBARD - - - - - *Petitioner*

versus

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD - - - - *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

KYLE T. HUBBARD
Counsel of Record
2100 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202
(502) 582-1891
Counsel for Petitioner

March 20, 1997

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

38 pp

QUESTION PRESENTED FOR REVIEW

Whether the Kentucky Education Professional Standards Board may not, consistent with due process, revoke a school teacher's teaching certificate, thereby extinguishing her professional teaching career and livelihood, without presenting any evidence whatsoever that the teacher's "off-duty" conduct impaired her ability to function as a teacher, and where the only evidence presented as to fitness supported her fitness to teach.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION OF THIS COURT 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT

The Kentucky Education Professional Standards Board may not, consistent with due process, revoke a school teacher's teaching certificate, thereby extinguishing her professional teaching career and livelihood, without presenting any evidence whatsoever that the teacher's "off-duty" conduct impaired her ability to function as a teacher, and where the only evidence presented as to fitness supported her fitness to teach. 4

CONCLUSION 11

APPENDIX

Court of Appeals of Kentucky Opinion, September 20, 1996 ..... 1a

Supreme Court of Kentucky Order Denying Discretionary Review, January 22, 1997 ..... 10a

Franklin Circuit Court Judgment, July 25, 1995 11a

Kentucky Education Professional Standards Board Final Order, March 21, 1995 ..... 15a

Court of Appeals of Kentucky Order Denying Petition for Rehearing, November 15, 1996 .. 16a

Stipulation by Petitioner and Board, December 13, 1994 ..... 17a

Transcript of Hearing Excerpt, pp. 4-9, December 13, 1994 ..... 19a

TABLE OF AUTHORITIES

	PAGE
Constitutional Provisions:	
Fourteenth Amendment, United States Constitution	2
Statute:	
Kentucky Revised Statute 161.120(1)(a)	2, 3
Cases:	
Alford v. *Ingram*, 931 F.Supp. 768 (M.D. Ala. 1996)	7
Board of Education v. *Wood*, Ky., 717 S.W.2d 837 (1986)	4, 5
Burton v. *Cascade School District*, 353 F.Supp. 254 (D.Ore. 1973), affirmed 512 F.2d 850 (9th Cir. 1975), cert. denied 423 U.S. 839	6
Golden v. *Board of Education*, W.Va., 285 S.E.2d 665 (1981)	9–10
Gloster v. *General Services Administration*, 720 F.2d 700 (D.C. Cir. 1983)	8, 9
Hoagland v. *Mount Vernon School District*, Wash., 623 P.2d 1156 (1981)	7, 8
Kolender v. *Lawson*, 461 U.S. 356 (1983)	7
Norton v. *Macy*, 417 F.2d 1161 (D.C. Cir. 1969)	6, 8–9
Perkins v. *Stewart*, Ky.App., 799 S.W.2d 48 (1990)	4–5
Phillips v. *Bergland*, 586 F.2d 1007 (4th Cir. 1978)	8
Thompson v. *Southwest School District*, 483 F.Supp. 1170 (W.D. Mo. 1980)	7, 9

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

CAROL B. HUBBARD - - - - - - - *Petitioner*

versus

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD - - - - - - *Respondent*

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky, rendered September 20, 1996, is not published. This opinion is set forth in this Appendix at 1a.

The judgment of the Franklin Circuit Court, entered on July 25, 1995, is set forth in this Appendix at 11a.

The final order of the Kentucky Education Professional Standards Board, entered on March 21, 1995, is set forth in this Appendix at 15a.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals of Kentucky was rendered on September 20, 1996. [1a] A timely petition for rehearing was denied by order entered on November 15, 1996. [16a] A timely motion for discretionary review by the Supreme Court of Kentucky was denied on January 22, 1997. [10a] This Court has jurisdiction to review the judgment of the Court of Appeals of Kentucky pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment to the United States Constitution

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

Kentucky Revised Statute 161.120(1)(a)

> Any certificate issued under KRS 161.010 to 161.100 . . . may be revoked by the Education Professional Standards Board for . . . immorality. . . .

STATEMENT OF THE CASE

Petitioner Carol B. Hubbard has held a Kentucky teaching certificate from 1966 to the present. She has served as a teacher in Kentucky schools from 1966 to the present, with the exception of a period of time when she resided in Washington, D.C., from 1984 until 1993. In 1992, she unsuccessfully ran for Congress in Kentucky's Fifth Congressional District. In 1993, she returned to her teaching career in Kentucky.

In 1994, she was accused of a federal misdemeanor, aiding and abetting in the wrongful use of federal employees, in connection with her unsuccessful 1992 campaign for Congress, and on March 28, 1994, she settled the misdemeanor charge by plea bargain. The Honorable Louis F. Oberdorfer, United States District Judge, observed:

> I am satisfied that you're a victim and not a perpetrator and I'm satisfied that you're thoroughly remorseful. [Stipulation by Petitioner and the Board, 17a]

Her contract to teach school was subsequently renewed for school years 1994-1996.

Nevertheless, on October 24, 1994, the Kentucky Education Professional Standards Board ("Board") issued a statement of charges accusing petitioner of: 1) willful and knowing violation of school laws and regulations; 2) immorality; and 3) misconduct in office. The first and third charges were subsequently dismissed.

Only the "immorality" charge remained, based on Kentucky Revised Statute 161.120(1)(a):

> Any certificate issued under KRS 161.010 to 161.100 . . . may be revoked by the Education Professional Standards Board for . . . immorality. . . .

The December 13, 1994 hearing on this charge was brief. The evidence, or lack thereof, was as follows. The Board filed, without comment, documents relating to petitioner's plea agreement on the federal misdemeanor.

> Board's Counsel: [M]y first witness and only witness is Terri Eversole. . . . And, just briefly, go through each one, and tell . . . what the document is.
>
> Ms. Eversole: Okay. Exhibit 6 is the charges against Ms. Hubbard. Exhibit 7 is the guilty plea to the charges. Exhibit 8 is the transcript of the guilty plea. Exhibit 9 is the government sentencing memorandum. Exhibit 11 is the government's response to Ms. Hubbard's sentencing memorandum. Exhibit 12 is Ms. Hubbard's response to the government's sentencing memorandum.
>
> Board's Counsel: [T]hat is basically the case — the factual case of the Board. [Transcript of Hearing, December 13, 1994, pp. 4-9, 19a-22a]

The Board presented *no evidence whatsoever* to demonstrate that petitioner's misdemeanor conduct, which occurred in a context other than her teaching profession, had any nexus to her teaching performance.

REASON FOR GRANTING THE WRIT

THE KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD MAY NOT, CONSISTENT WITH DUE PROCESS, REVOKE A SCHOOL TEACHER'S TEACHING CERTIFICATE, THEREBY EXTINGUISHING HER PROFESSIONAL TEACHING CAREER AND LIVELIHOOD, WITHOUT PRESENTING ANY EVIDENCE WHATSOEVER THAT THE TEACHER'S "OFF-DUTY" CONDUCT IMPAIRED HER ABILITY TO FUNCTION AS A TEACHER, AND WHERE THE ONLY EVIDENCE PRESENTED AS TO FITNESS SUPPORTED HER FITNESS TO TEACH.

In the education employment context, the Kentucky Court has stated the due process parameters for revocation based on conduct which occurs in a context separate from competency in the classroom.

> It was not the intention of the legislature to subject every teacher to discipline or dismissal for private shortcomings that might have come to the attention of the Board of Education but have no relation to the teacher's involvement or example to the school community. The power of the Board to discipline teachers is not based on personal moral judgments by Board members. It exists only because of the legitimate interests of the government in protecting the school community and the students from harm. *Board of Education* v. *Wood*, Ky., 717 S.W.2d 837, 840 (1986).

Even more directly, the Kentucky Court has held,

> We agree with both Perkins and the board that the status of being a felon alone does not automatically allow a state agency to deprive one of his livelihood.

Perkins v. *Stewart*, Ky.App., 799 S.W.2d 48, 51 (1990). Just as a felon cannot be deprived of his livelihood based on his status as a felon, so petitioner should not be deprived of her livelihood based on her status as a misdemeanant. Due process in Kentucky requires substantial evidence of a nexus between the conduct and professional competency in the classroom.

> [T]he conduct, when it occurs in a context other than professional competency in the classroom should have some nexus to the teacher's occupation. *Board of Education* v. *Wood, supra*, 717 S.W.2d at 840.
>
> * * *
>
> Perkins did not contest the cabinet's assertion that he had been convicted. He appealed on the basis that the convictions were not "work related." That issue is, in our opinion, the pivotal issue that should have been the focus of the hearing. *Perkins, supra*, 799 S.W.2d at 51.

In the present case, as in *Perkins*, due process required that the pivotal issue at the Board's hearing should have been whether petitioner's misdemeanor conviction was or was not work-related. Nevertheless, the Board introduced no evidence whatsoever on that pivotal issue. Further, the Kentucky Courts ignored the holdings of the cases set forth above, which reflect the established state of the law nationwide, to deny due process of law. This is the injustice which this Court is asked to correct by granting certiorari.

At the hearing, the Board and petitioner stipulated that petitioner's teaching record was excellent.

> Carol Brown Hubbard has properly and capably performed and fulfilled her duties as a teacher throughout her career at the following schools [six schools listed, for the years 1966 through 1995]. [Stipulation, 17a]

The Board and petitioner stipulated the remarks of the misdemeanor sentencing judge, United States District Judge Oberdorfer, made at sentencing on June 30, 1994.

> JUDGE OBERDORFER: [Y]ou obviously led a productive and a very useful life as a teacher and I hope that despite your present difficulties you can resume and the authorities in Kentucky will permit you to resume your teaching career, wiser for this experience. . . . [H]aving said all that I wish for you an opportunity to return to your career as a teacher and hopefully spend an useful life. [Stipulation, 17a-18a]

The Board further stipulated the admission of letters from two school principals instead of requiring their appearances. They affirmed petitioner's exemplary performance as a teacher and her fitness to teach notwithstanding the misdemeanor plea.

Federal and state cases establish principles of due process dispositive of the present issue.

"Immorality" or "immoral conduct" in an off-duty context, without more, is insufficient to justify professional discipline.

> Preliminarily, we must reject appellee's contention that once the label "immoral" is plausibly attached to an employee's off-duty conduct, our inquiry into the presence of adequate rational cause for removal is at an end. *Norton* v. *Macy*, 417 F.2d 1161, 1165 (D.C. Cir. 1969).

A statute that purported to dismiss teachers based on "Immorality" was held "unconstitutionally vague." *Burton* v. *Cascade School District*, 353 F.Supp. 254, 255 (D. Ore. 1973), affirmed 512 F.2d 850 (9th Cir. 1975), cert. denied 423 U.S. 839.

However, even an unconstitutional statute can become constitutional with a limiting construction.

> Under well-settled law, a statute may not be declared unconstitutionally vague if it is subject to a narrowing construction which will cure its constitutional ill. See *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 749-50, 81 S.Ct. 1784, 1789-90, 6 L.Ed.2d 1141 (1961). *Alford* v. *Ingram*, 931 F.Supp. 768, 771 (M.D. Ala. 1996).

See, Kolender v. *Lawson*, 461 U.S. 356, 356 (1983).

The limiting construction which saves a vague "immorality" or "immoral conduct" disciplinary statute is the construction which limits "immorality" to mean "rendering a teacher unfit to teach."

> [S]imilar statutes are facially constitutional with a limiting construction. In all of these cases, the courts have interpreted the words in the statutes to imply an unfitness to teach. [Citation omitted.] [D]irect connection needed between misconduct and teacher's work. [Citation omitted.] "[I]mmoral conduct" limited to mean "rendering a teacher unfit to teach" to avoid vagueness. *Alford* v. *Ingram, supra*, 931 F.Supp. at 773.
>
> * * *
>
> [T]he Court believes that the term "immoral conduct" was intended in this context to relate to conduct which would render a teacher unfit for the performance of his duties. *Thompson* v. *Southwest School District*, 483 F.Supp. 1170, 1180 (W.D. Mo. 1980).
>
> * * *
>
> In most cases, because the statutes do not stipulate certain conduct as per se grounds for dismissal, it will be a question of fact whether the complained of acts constitute sufficient cause. . . . Sufficient cause, though not statutorily defined, has been interpreted to mean a showing of conduct which materially and substantially affects the teacher's performance. *Hoagland* v. *Mount Vernon School District*, Wash., 623 P.2d 1156, 1159 (1981).

Even *criminal* conduct which is "off-duty" must be shown by substantial evidence to adversely affect the teacher's professional competency in the classroom.

> The federal government and society in general certainly do not condone welfare fraud, but punishment for such offenses is entrusted by the Act to the criminal process so long as the offense has no work-related effects. . . . The nexus requirement is particularly strict in cases involving non-work-related misconduct. *Gloster* v. *General Services Administration*, 720 F.2d 700, 704, 703 (D.C. Cir. 1983).
>
> * * *
>
> Without an actual showing of impairment to teaching, simply labelling an instructor as a convicted felon will not justify a discharge. . . . [I]t would violate due process to discharge a teacher without showing actual impairment to performance. *Hoagland, supra*, 623 P.2d at 1159.
>
> * * *
>
> Accordingly the mere fact that the employee has committed an immoral or disgraceful act — even a criminal act — will not justify a discharge unless it can be said that there is what the courts have described as a "vital nexus" between the act and the "efficiency of the service." *Phillips* v. *Bergland*, 586 F.2d 1007, 1011 (4th Cir. 1978).

Case after case requires substantial evidence of this "vital nexus" between off-duty misconduct and the work duties of the employee to be disciplined. Where substantial evidence of this "vital nexus" is lacking, the employee will not be deprived of her livelihood.

> The peculiar feature of appellant's dismissal, however, is that it rests on none of these possible effects on the service. The NASA official who fired him, Mr. Gabarini, testified that appellant was a "competent employee" doing "very good" work. . . . [A]ppellant's

> discharge cannot be sustained. *Norton* v. *Macy*, 417 F.2d 1161, 1166, 1168 (D.C. Cir. 1969).
>
> * * *
>
> Evaluation of the evidence presented in this case and to the board of education at the hearing on December 21, 1979, convinces the Court that no evidence has yet been developed indicating that plaintiff's conduct has rendered her unfit to teach. . . . [D]efendants are hereby restrained from suspending plaintiff. *Thompson* v. *Southwest School District*, 483 F.Supp. 1170, 1182, 1185 (W.D. Mo. 1980).
>
> * * *
>
> In the present case whatever force the MSPB's presumption commanded was dispelled by Gloster's contention, and the GSA's confirmation, that her conviction bore no relation to her job performance, and was not so notorious so as to discredit the agency or otherwise affect the performance of others. . . . [W]e reverse the decision of the Board and remand the case with directions to order reinstatement and back pay. *Gloster, supra*, 720 F.2d at 704, 705.

In a case on "all fours," *Golden* v. *Board of Education*, W.Va., 285 S.E.2d 665 (1982), a statute authorized teacher discipline for undefined "immorality." The Court stated the well-established rule of construction requiring nexus.

> When confronted with this problem courts seek to determine if a "rational nexus" exists between the conduct complained of and the duties to be performed. *Golden, supra*, 285 S.E.2d at 668.

In *Golden*, the "off-duty" conduct was shoplifting. The only evidence submitted to the Board to support the charge of "immorality" consisted of the arrest and plea records, as in the present case.

> In the case now before this Court, the only evidence submitted to the Board to support the charge of immorality were the records of the magistrate indicating

> the arrest on the aforestated charge and Mrs. Golden's plea of nolo contendere thereto. The Board apparently adopted the view that conviction on the misdemeanor charge was *per se* immoral conduct within the meaning of the statute. *Golden, supra,* 285 S.E.2d at 669.

In *Golden,* as in the present case, the only evidence in the record relating to the teacher's fitness to teach was favorable to the teacher.

> The only evidence in the record before the Board relating to fitness to teach was the favorable testimony of Mrs. Golden's fellow teachers and of the principal and assistant principal at her high school. *Golden, supra,* 285 S.E.2d at 669.

In *Golden,* the court reversed and remanded "with instructions to direct the board of education to reinstate Arlene Golden." *Id.,* p. 669. The court held that the required nexus had not been shown:

> From this evidence, the Court concludes that the Board was presented with no evidence from which it could conclude that the petitioner was unfit to teach. Indeed, the evidence indicates that it should have concluded the opposite. *Golden, supra,* 285 S.E.2d at 669.

The court stated the due process reason for requiring the nexus to be shown:

> One reason for requiring a showing that the alleged immoral conduct has a resulting impact upon the teacher's fitness to teach or upon the school community is that to examine only the conduct itself would result in a statute that would be void for vagueness under substantive due process constitutional standards. *Golden, supra,* 282 S.E.2d at 669.

In the present case, as in *Golden,* the required nexus between the "off-duty" misconduct and the teacher's fitness to teach was never shown. In fact, all the evidence presented *favorably* demonstrated her fitness to teach.

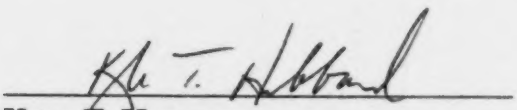
All of the above cases demonstrate the well-established due process requirements of nexus and substantial evidence to prove nexus between off-duty conduct (including criminal conduct) and job performance, before a person's career and livelihood can be taken away.

Nevertheless, in the present case, neither the Board nor the Kentucky Courts followed these well-established due process requirements, to effect the revocation of petitioner's teaching certificate.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,



KYLE T. HUBBARD
2100 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202
(502) 582-1891
Counsel for Petitioner
Carol B. Hubbard

Member of the Bar of the
United States Supreme Court

RENDERED: SEPTEMBER 20, 1996; 10:00 A.M.

NOT TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 95-CA-002056-MR

CAROL B. HUBBARD - - - - - - - - - *Appellant*

v.

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD - - - - - - - - - *Appellee*

Appeal From Franklin Circuit Court
Honorable Roger Crittenden, Judge
Civil Action No. 95-CI-000401

OPINION—AFFIRMING AND REMANDING WITH DIRECTIONS

BEFORE: WILHOIT, Chief Judge; HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, JUDGE. Carol B. Hubbard appeals from a Franklin Circuit Court judgment that affirmed a decision of the Kentucky Education Professional Standards Board (EPSB) that revoked her teaching certificate for two years based upon a finding of "immorality." The EPSB's action followed Hubbard's plea of guilty in the United States District Court for the District of Columbia to the misdemeanor charge of aiding and abetting the theft of govern-

ment property in violation of 18 United States Code (USC) §§ 641 and 2.[1]

---

[1]The information to which Hubbard pled charges that:

"1. From in or about November, 1990, to in or about May, 1992, the defendant, CAROL BROWN HUBBARD, was a candidate for election to the United States House of Representatives for the Fifth Congressional District of Kentucky.

"2. From in or about January, 1975, to in or about January, 1993, Carroll Hubbard, Jr. was a Member of the United States House of Representatives, representing the First Congressional District of Kentucky.

"3. The Carol Brown Hubbard for Congress Committee (CBHCC) was the principal campaign committee authorized to support the candidacy of CAROL BROWN HUBBARD for Congress.

"4. At various times beginning in or about October, 1991, and continuing through May, 1992, Carroll Hubbard, Jr. directed and ordered employees of his Congressional office, whose identities are known to the United States Attorney, to travel to various locations outside the First Congressional District, to assist the defendant, CAROL BROWN HUBBARD, in connection with her primary election campaign for the Fifth Congressional District, while those employees were receiving salaries from the House of Representatives.

"5. Carroll Hubbard, Jr. directed and ordered his employees who worked on the campaign of the defendant, CAROL BROWN HUBBARD, to state that they were on vacation at the time they were working on the CAROL BROWN HUBBARD campaign when in fact they were not on vacation.

"6. In order to prevent anyone from discovering that Congressional office employees of Carroll Hubbard, Jr., were working on the defendant's campaign while receiving a salary from the House of Representatives, Carroll Hubbard, Jr., suggested and directed that certain of the employees use aliases when working on the defendant's campaign. The defendant, CAROL

(footnote continued next page)

Hubbard was granted a Kentucky teaching certificate in 1966 and taught school in Kentucky until 1984 when she married United States Congressman Carroll Hubbard and moved to Washington, D.C. After unsuccessfully running for Congress herself in 1992, Hubbard resumed her teaching career In Kentucky in 1993.

Based upon allegations that Representative Hubbard's federal employees worked on his wife's campaign, both Representative Hubbard and Hubbard faced criminal charges for campaign violations in federal court in the District of Columbia. In April 1994, Hubbard entered a guilty plea to the misdemeanor charge of "aiding and abetting and indi-

---

(footnote continued from preceding page)

BROWN HUBBARD, was aware that the employees were using aliases and introduced certain of these employees by their aliases.

"7. At various times beginning in October, 1991 and continuing through May, 1992, employees of the Congressional office of Carroll Hubbard, Jr., as well as employees of the Subcommittee on General Oversight and Investigations of the Committee on Banking, Finance and Urban Affairs of the House of Representatives, during hours when those employees were receiving a salary for and were supposed to be performing official business of the House of Representatives engaged in campaign activities on behalf of the defendant, CAROL BROWN HUBBARD, with the knowledge of the defendant, including accompanying the defendant at various campaign events in the Fifth Congressional District of Kentucky, preparing written solicitations for contributions, arranging fundraising events, preparing letters acknowledging contributions, maintaining the records of the CBHCC, preparing reports to the Federal Election Commission on behalf of the CBHCC.

"8. Beginning in or about October, 1991, through in or about May, 1992, in the District of Columbia and elsewhere, the defendant, CAROL BROWN HUBBARD, willfully and knowingly aided and abetted Carroll Hubbard, Jr., in stealing and converting to his own use and to the use of the defendant, property of the United States, that is, the value of the salaries paid by the United States House of Representatives to its employees."

rectly causing the conversion and theft of . . . the services of employees of the United States House of Representatives assigned to the offices of [her husband]." Since Hubbard was teaching in Hardin County at the time of her guilty plea, the Superintendent of the Hardin County School System notified the EPSB of the conviction.

On March 21, 1995, the EPSB revoked Hubbard's certificate until July 1, 1997. The following day, Hubbard sought injunctive relief and judicial review of the revocation order in Franklin Circuit Court. She also asserted a 42 U.S.C. § 1983 claim. The circuit court initially granted injunctive relief, but ultimately affirmed the revocation order and dismissed the section 1983 claim. Hubbard appealed to this Court and sought Ky. R. Civ. Proc. (CR) 65.08(7) emergency relief.[2] In September 1995, another panel of this Court granted Hubbard's motion for a stay pending appeal. Subsequently, the Supreme Court of Kentucky denied the EPSB's motion to lift the stay.

Hubbard contends on appeal, as she did below, that the use of the term "immorality," without further definition, renders Ky. Rev. Stat. (KRS) 161.120(l)(a) unconstitutionally vague.[3] KRS 161.120(l)(a) provides:

> *Any certificate* issued under KRS 161.010 to 161.100, or any certificate or license issued under any previous law to superintendents, principals, teachers,

---

[2]Ky. R. Civ. Proc. (CR) 65.08(7) provides: "If a movant will suffer irreparable injury before the Court of Appeals may hear the motion, the movant may request emergency relief from a member of the Court which may be granted ex parte if necessary . . . ."

[3]CR 24.03, in relevant part, explains that "[w]hen the constitutionality of an act of the General Assembly affecting the public interest is drawn in question *in any action to which the State or* an officer, *agency,* or employee *thereof is not a party,* the movant shall serve notice of the motion upon the Attorney General." (Emphasis supplied.) The Education Professional Standards Board (EPSB) Is an agency of the state.

> supervisors, directors of pupil personnel, or other administrative, supervisory, or instructional employees *may be revoked by the Education Professional Standards Board for immorality*, misconduct in office, incompetency, violation of the school laws of the state or administrative regulations adopted by the State Board for Elementary and Secondary Education, willful neglect of duty, conviction of a misdemeanor offense under KRS Chapter 510 involving a student, or a felony offense under KRS Chapter 510, 530.064, or 531.310, or being found by the Education Professional Standards Board to have had sexual contact as defined in KRS 510.010(7) with a student, or upon the determination that a certificate applicant presented or declared false information toward obtaining the issuance or renewal of any type of teacher certification. (Emphasis supplied.)

An enactment is "void for vagueness" if "[people] of common intelligence[4] must . . . guess at its meaning." *State Bd. of Elementary and Secondary Educ. v. Howard*, Ky., 834 S.W.2d 657, 662 (1992). *See also Fowler v. Board of Educ. of Lincoln County*, Ky., 819 F.2d 657, 664 (6th Cir. 1987); *Thompson v. Southwest Sch. Dist.*, 483 F.Supp. 1170, 1178 (W.D. Mo. 1980) (stating that "it has become a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined"); and Romualdo P. Eclavea, Annotation, *Supreme Court's Application of Vagueness Doctrine to Noncriminal Statutes or Ordinances*, 40 L.Ed.2d 823 (1974). In *Cornette v. Commonwealth*, Ky.App., 899 S.W.2d 502, 508 (1995), this Court explained that:

> A statute is impermissibly vague when "a person disposed to obey the law could [not] determine with reasonable certainty from the language used whether contemplated conduct would amount to a violation." (Citations omitted.)

---

[4]Ky. Rev. Stat. (KRS) 446.080(4) provides that "[a]ll words and phrases shall be construed according to the common and approved usage of language . . . ."

See also Thompson, 483 F.Supp. at 1179 (saying that "the standard test for determining whether the terms of a statute are sufficiently precise to comply with due process concepts is whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly"). Yet, "not every statute which a reviewing court believes could have been drafted with greater precision is unconstitutionally vague." *Thompson*, 483 F.Supp. at 1178. In fact, "[t]here is a strong presumption of constitutionality which is afforded any enactment of the General Assembly." *Kraus v. Kentucky State Senate*, Ky., 872 S.W.2d 433, 438 (1994).

Since KRS Chapter 161 does not define "immorality," Hubbard argues that KRS 161.120 (1) (a) fails to provide fair warning that her guilty plea would support a finding of "immorality." The term "immoral" is commonly understood to mean conduct that is "[c]ontrary to accepted moral principles." *Webster's II New Riverside University Dictionary* 612 (1984). *See also Black's Law Dictionary* 751 (6th ed. 1990). The problem is that "[i]mmorality means different things to different people . . . ." *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F.Supp. 254, 255 (D. Or. 1973). "In the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice constitute immoral conduct." *Kenai Peninsula Borough Bd. of Educ. v. Brown*, 691 P.2d 1034, 1040 (Alaska 1984), quoting *Morrison v.* State *Bd. of Educ.*, 461 P.2d 375, 382 (Cal. 1969).

Although we are not prepared to say that the EPSB is free to define all acts offensive to the subjective moral principles of its members as "immoral," we are unable to say that KRS 161.120(1)(a) is unconstitutionally vague as it applies to Hubbard. Hubbard pled guilty to a theft-related misdemeanor. We are unaware of any civilized society in which theft is consistent with "accepted moral principles." Even though "immorality" is a vague term, Hubbard must have known that "theft" is "contrary to accepted moral principles" when she pled guilty to such a charge. Accordingly, KRS 161.120(l)(a) is not unconstitutional as applied to Hubbard.

Alternatively, Hubbard argues that revocation of her teaching certificate was improper because there is no nexus between her conviction and her performance as a teacher. Discussing a different, but related statute, KRS 161.790, in *Board of Educ. of Hopkins County v. Wood*, Ky., 717 S.W.2d 837, 840 (1986), the Supreme Court said that "the [allegedly immoral] conduct, when it occurs in a context other than professional competency in the classroom[,] should have some nexus to the teacher's occupation . . . ." Providing for the termination of a teacher's contract for "[i]mmoral character or conduct unbecoming a teacher," KRS 161.790(1)(b) is substantially similar to KRS 161.120(1)(a) which provides for the revocation of teaching certificates. The similarity of KRS 161.120(1)(a) and KRS 161.790(1)(b) leads us to an interpretation of KRS 161. 120(1)(a) requiring the alleged immorality to "have some nexus to the teacher's occupation." *Id.* at 840.

Since "[t]he school teacher has traditionally been regarded as a moral example for the students," the required nexus is satisfied if the teacher's conduct is of the type that tends to make a "harmful impression . . . on the students." *Board of Educ. of Laurel County v. McCollum*, Ky., 721 S.W.2d 703, 705 (1986). Speaking to the nexus issue in this case, the circuit court said:

> The facts in Hubbard's case show she was convicted of aiding in the theft of government property. At a time when Hubbard should have been an example of leadership, responsibility, and honesty, she chose to take government property for her own benefit. Her actions are immoral and a poor example for her students. Thus, the Board had substantial evidence for its finding that Hubbard's actions constitute immorality under KRS 161.120(1)(a).

A nexus has been identified and we, like the circuit court, will not substitute our judgment for that of the EPSB. *See Kentucky Bd. of Nursing* v. *Ward*, Ky.App., 890 S.W.2d 641, 642 (1994) (emphasizing that an appellate court is not to "substitute its judgment as to the credibility of the wit-

nesses and/or the weight of the evidence concerning questions of fact" in administrative matters).

Hubbard's contention that the circuit court erred in dismissing her 42 U.S.C. § 1983 claim is also without merit. The statute provides that:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . . (Emphasis supplied.)

While it is true that Hubbard has a property interest in her teaching certificate, the EPSB is not a "person" for purposes of 42 U.S.C. § 1983. *See Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (holding that "[s]tates and state officials acting officially" are not "persons" subject to liability under 42 U.S.C. § 1983). Since the EPSB is an agency of the state, the circuit court correctly dismissed Hubbard's 42 U.S.C. § 1983 claim.

Hubbard also contends that the circuit court erred in entering a protective order prohibiting her from conducting further discovery. We disagree. Hubbard sought to discover "all records, memoranda, correspondence and documents received and/or reviewed by [the Chair of the EPSB] before voting on [the] case at the March 21, 1995 [EPSB] meeting." As a general rule, the circuit "court is not free to consider new or additional evidence . . . ." *Kentucky Bd. of Nursing,* 890 S.W.2d at 642. *See also American Beauty Homes Corp. v. Louisville and Jefferson County Planning and Zoning Comm'n,* Ky., 379 S.W.2d 450, 457 (1964) (indicating that new or additional evidence may be admissible only "to determine what state of facts the [agency] acted on, or possibly to establish the violation of some legal right with respect to a matter not in issue in proceedings before the [agency]"). By asserting the 42 U.S.C. §

1983 claim, Hubbard attempted to raise an issue in the circuit court that had not been considered by the EPSB. If Hubbard's 42 U.S.C. § 1983 claim had been a viable one, additional discovery *might* have been appropriate under *American Beauty Homes*, 379 S.W.2d at 457. Since the 42 U.S.C. § 1983 claim was properly dismissed, however, it was not. Finding no other justification for consideration of "new or additional evidence," the circuit court was correct in prohibiting further discovery.

The judgment revoking Hubbard's teaching certificate until July 1, 1997, is affirmed.[5]

WILHOIT, JUDGE, CONCURS.

SCHRODER, JUDGE, DISSENTS WITHOUT SEPARATE OPINION.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:
Kyle T. Hubbard
Louisville, Kentucky

BRIEF AND ORAL ARGUMENT FOR APPELLEE:
Robert E. Stopher
BOEHL, STOPHER & GRAVES
Louisville, Kentucky

---

[5]Although enforcement of the EPSB revocation has been suspended during the pendency of this appeal, the EPSB has not cross-appealed seeking extension of the suspension period. We are thus without authority to extend the revocation period beyond July 1, 1997, although invited to do so by the EPSB in its brief. The action by the EPSB appears to have been remedial in nature, rather than punitive. *Cf. United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989). It apparently was intended to remedy the adverse effect which the appellant's conviction might have on students by virtue of her being a role model for them. The Board must have believed that this adverse effect would disappear after two years when the conviction was safely "old news" and out of current public discourse.

SUPREME COURT OF KENTUCKY

96-SC-1062-D
(95-CA-2056-MR)

CAROL B. HUBBARD - - - - - - - - *Movant*

v.

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD - - - - - - - *Respondent*

Franklin Circuit Court
95-CI-401

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C.J., and Cooper, Lambert and Wintersheimer, JJ., all concur.

ENTERED January 22, 1997.

/s/ Robert F. Stephens
Robert F. Stephens
Chief Justice

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

Civil Action No. 95-CI-00401

CAROL B. HUBBARD - - - - - - - - *Plaintiff*

v.

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD - - - - - - - - *Defendant*

JUDGMENT—Entered July 25, 1995

This matter comes before the Court on the appeal of Carol B. Hubbard from a decision of the Education Professional Standards Board ("the Board") revoking her certificate for two years.

In May 1994, Carol Hubbard entered a guilty plea to a federal misdemeanor charge that arose from her conduct during a 1992 congressional race. During her campaign, Hubbard used employees from the office of her husband, U.S. Rep. Carroll Hubbard, to work on her campaign. These employees were on the government payroll when they worked for her. Accordingly, Hubbard pled guilty to one misdemeanor count of aiding and abetting the theft of government property.

Because Hubbard is a fifth grade teacher, she is subject to KRS 161.120(l)(a) which says the Board may revoke a teacher's certificate for immorality, among other things. The Board charged Hubbard with immorality based on her guilty plea. After a hearing on the merits, a hearing officer determined (1) Hubbard had engaged in immoral con-

duct by violating federal law, and (2) a nexus existed between the immoral conduct and her teaching certificate because Hubbard serves as a moral example for her students. The hearing officer therefore recommended the Board revoke Hubbard's certificate for one year. The full board upheld the hearing officer's finding of immorality but increased the revocation to two years instead of one. Hubbard now appeals that decision.

JUDGMENT

First, Hubbard argues the term "immorality" in KRS 161.120(1)(a) is unconstitutionally vague because it fails to give notice of what conduct is prohibited and allows erratic enforcement. In *Colten v. Kentucky*, 407 U.S. 104, 110 (1972), the Supreme Court said:

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing ... statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Accordingly, due process is violated only when a "'statute . . . either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Fowler v. Board of Educ. of Lincoln County*, 819 F.2d 657, 664 (6th Cir. 1987) (quoting *Connally v. General Construction* Co., 269 U.S. 385, 391 (1926)). Whether the statute is vague will depend on how the statute is applied. *Maynard* v. *Cartwright*, 486 U.S. 356, 361 (1988). Therefore, this Court must decide if KRS 161.120(1)(a) is vague as applied to Hubbard.

Hubbard's immorality is aiding in the theft of government property. Her conduct was egregious enough for a federal misdemeanor conviction. Courts are hesitant to call a statute vague if the employee's conduct falls within a statutory prohibition. *Fowler*, 819 F.2d at 665. The reasoning behind this hesitancy is that an employee is put on

notice by the statute that his conduct is either illegal or inappropriate. Hubbard had adequate notice that her conduct constituted immorality because a criminal statute was in effect prohibiting her conduct. Indeed, theft has traditionally been regarded as a crime of moral turpitude. Hence, KRS 161.120(1)(a) is not vague as applied to Hubbard.

Second, Hubbard argues her misdemeanor conviction does not have a nexus to her fitness to teach as required by *Board of Educ. of Hopkins County v. Wood*, Ky., 717 S.W.2d 837 (1986). Although the issue in *Wood* was the application of a statute requiring written records to support termination of a teacher, the Court provided some guidance for the use of immoral conduct to discharge a teacher. For instance, the Court said the conduct should have some nexus to the teacher's occupation if the alleged immoral conduct occurs outside the classroom. *Id.*

The Court's reference to a nexus requirement may not be the holding of *Wood*, but it is relevant to a discussion of what kind of immoral conduct subjects a teacher to revocation of a certificate. As the Court noted, the legislature did not intend to subject a teacher to discipline for private shortcomings that have no relation to the teacher's involvement or example to the school community. *Id.* But the legislature did intend to hold teachers to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. *Wood*, 717 S.W.2d at 839. Teachers are held to a high standard because they have traditionally been regarded as moral examples for their students. *Id.* Accordingly, an immoral act committed outside the classroom may have a nexus to the teacher's occupation if it sets a poor moral example. The conduct does not necessarily have to be related to in-class performance.

To determine what immoral acts subject a teacher to discipline, the Board must look at the facts and circumstances of each case. While conviction of a crime will not automatically lead to revocation of a certificate, it is one

factor to be considered. The facts in Hubbard's case show she was convicted of aiding in the theft of government property. At a time when Hubbard should have been an example of leadership, responsibility, and honesty, she chose to take government property for her own benefit. Her actions are immoral and a poor example for her students. Thus, the Board had substantial evidence for its finding that Hubbard's actions constitute immorality under KRS 161.120(1)(a).

THEREFORE, the decision of the Education Professional Standards Board is AFFIRMED and Hubbard's appeal is DISMISSED.

So ordered this 25th day of July, 1995. There being no just cause for delay, this is a final and appealable JUDGMENT.

/s/ Roger L. Crittenden
Roger L. Crittenden
Judge, Franklin Circuit Court

DISTRIBUTION:
Robert E. Stopher
Palmer G. Vance, II
BOEHL, STOPHER & GRAVES
Suite 2300
400 W. Market Street
Louisville, Kentucky 40202-3346

Kyle T. Hubbard
2100 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202

COMMONWEALTH OF KENTUCKY
EDUCATION PROFESSIONAL STANDARDS BOARD

IN RE: CAROL BROWN HUBBARD
CERTIFICATE NUMBER: 402-48-4266

FINAL ORDER

This matter having come before the Education Professional Standards Board on March 21, 1995, and the Board having reviewed the record and being otherwise sufficiently advised, hereby orders:

The Education Professional Standards Board adopts the "Findings of Fact and Conclusions of Law" of the Hearing Officer with the following modifications:

1) Delete paragraph five (5) of the Conclusions of Law;

2) Finds that the Respondent's actions constitute immorality under KRS 161.120 and not misconduct in office, and;

3) Amends paragraph seven (7) of the Conclusions of Law to read as follows: "The Education Professional Standards Board is justified in revoking the teaching certificate of the Respondent, Carol Brown Hubbard, for immorality pursuant to KRS 161.120.

Therefore, the Education Professional Standards Board REVOKES the Respondent's Certificate (402-48-4266) until July 1, 1997.

So ordered on this the 21st day of March, 1995.

/s/ Daniel Greene
Daniel Greene, Chair
Education Professional
Standards Board

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 95-CA-2056-MR

CAROL B. HUBBARD - - - - - - - - *Appellant*

v.

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD - - - - - - - - *Appellee*

Appeal From Franklin Circuit Court
Honorable Roger Crittenden, Judge
Action No. 95-CI-000401

ORDER DENYING PETITION FOR REHEARING

BEFORE: WILHOIT, CHIEF JUDGE, HUDDLESTON AND SCHRODER, JUDGES.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED.

/s/ Wil Schroder
Wil Schroder
Judge, Court of Appeals

Entered: November 15, 1996

COMMONWEALTH OF KENTUCKY
EDUCATION PROFESSIONAL STANDARDS BOARD

IN RE THE TEACHING CERTIFICATE OF:
RESPONDENT: HUBBARD, CAROL BROWN
CERTIFICATE NUMBER: 402-48-4266

STIPULATION

Comes the Respondent, Carol Brown Hubbard, and the Education Professional Standards Board, by counsel, and hereby stipulate as follows:

1. Carol Brown Hubbard has properly and capably performed and fulfilled her duties as a teacher throughout her career at the following schools:

(a)	Carlisle Elementary School Nicholas County School System Carlisle, Kentucky	1st grade 1966-1967
(b)	Richmond Elementary School Richmond City School System Richmond, Kentucky	5th grade 1967-1968
(c)	Pulaski Elementary School Pulaski County School System Somerset, Kentucky	1st grade 1968-1970
(d)	Hopkins Elementary School Somerset City School System Somerset, Kentucky	4th and 1st grades 1970-1984
(e)	Radcliff Middle School Hardin County School System Radcliff, Kentucky	5th grade 1993-1994
(f)	Brown Street Education Center Hardin County School System Vine Grove, Kentucky	 1994-1995

2. The parties stipulate the Transcript of Sentencing before the Honorable Louis F. Oberdorfer, United States District Judge, dated June 30, 1994, wherein Judge

Oberdorfer made the following comments:

(a) ". . . I am satisfied that you're a victim and not a perpetrator and I'm satisfied that you're thoroughly remorseful . . ." (p. 23);

(b) ". . . you obviously led a productive and a very useful life as a teacher and I hope that despite your present difficulties you can resume and the authorities in Kentucky will permit you to resume your teaching career, wiser for this experience." (p. 24);

(c) ". . . having said all that I wish for you an opportunity to return to your career as a teacher and hopefully spend an useful life." (p. 25).

3. The parties stipulate the Guilty Plea Agreement dated March 28, 1994.

4. The parties stipulate that certain letters will be introduced by the Respondent, Carol Brown Hubbard, and they may be admitted as evidence as the testimony of the writers of those letters so the school principals would not have to travel to Frankfort to participate in this hearing.

Education Professional Standards Board
By: /s/ Marcia Ford Seiler
Marcia Ford Seiler, Counsel
119 Capital Plaza Tower
500 Mero Street
Frankfort, Kentucky 40601

Carol Brown Hubbard
By: /s/ Kyle T. Hubbard
Kyle T. Hubbard, Counsel
2100 National City Tower
101 South Fifth Street
Louisville, Kentucky 40202

COMMONWEALTH OF KENTUCKY
EDUCATION PROFESSIONAL STANDARDS BOARD

IN RE THE TEACHING CERTIFICATE OF:
RESPONDENT: HUBBARD, CAROL BROWN
CERTIFICATE NUMBER: 402-48-4266

TRANSCRIPT OF HEARING, EXCERPT

The following is a transcript of the hearing held in the above-styled case on December 13, 1994, beginning at the hour of 10:00 a.m., at the Capital Plaza Tower, G-1, Frankfort, Franklin County, Kentucky, before Hon. Mary James Young, Hearing Officer.

* * * * *

4

* * * * *

HEARING OFFICER: Okay — very fine, then — let's begin with the first witness for the board.

Ms. Seiler: Okay — my first witness and only witness is Terri Eversole. And, I ask that she be sworn in.

The witness, Terri Eversole, being first duly sworn, testifies as follows:

QUESTIONING BY MS. SEILER:

Q1. Please state your full name for the record.

A. Terri Lynn Eversole.

Q2. And, Terri Eversole, who are you employed by?

A. The Kentucky Department of Education.

Q3. And, what is your position?

5

A. I am the clerk for the Education and Professional Standards Board.

Q4. And, as clerk, is it your responsibility to maintain the official file in the Education and Professional Standards Board's revocation cases?

A. Yes, it is.

Q5. And, in that position, did you maintain the file of Carol Brown Hubbard, certificate number 402-48-4266?

A. Yes.

Q6. Okay — please turn to Exhibit — Board Exhibit 1. Is this a document that is maintained in your files?

A. Yes, it is.

Q7. And, what is this document?

A. This is the teaching certificate that the Kentucky Department of Education issued for Ms. Hubbard. It is proof that she is eligible to teach in the elementary grades one through eight, and, kindergarten.

Ms. Seiler: I will move for entry of all of the exhibits at the end.

6

Q8. Exhibit 2 — is that a document maintained by your office?

A. Yes, it is.

Q9. Okay — and, what is that document?

A. It is the initial complaint sent by the superintendent of Hardin County, with a guilty plea (sic) attached, and, we have attached that to the statement of charges.

Q10. Okay — and, Exhibit 3 — what is this document?

A. This is an order and a cover letter, from the Education and Professional Standards Board, stating that there is probable cause to conduct a hearing.

Q11. And, Exhibit 4 — is that maintained by you?

A. Yes, it is.

Q12. And, what is Exhibit 4?

A. It is a statement of charges of facts of the crime committed by Ms. Hubbard, and, sets out her sentencing.

The guilty plea is attached as Exhibit A.

Q13. Please remember documents 5 through 13 and tell me whether these are files maintained by your office, and, how you came into possession of these documents.

7

A. Okay — all of these are maintained in the official files in my office. Exhibit 5 — Barbara Locker (sic) has requested pleadings from this case. This is the cover letter from the United States Department of Justice.

Q14. And, just briefly, go through each one, and, tell what number document — what exhibit number it is, and, what the document is.

A. Okay — Exhibit 6 is the charges against Ms. Hubbard. Exhibit 7 is the guilty plea to the charges. Exhibit 8 is the transcript of the guilty plea. Exhibit 9 is the government sentencing memorandum. Exhibit 10 is Ms. Hubbard's sentencing memorandum. Exhibit 11 is the government's response to Ms. Hubbard's sentencing memorandum. Exhibit 12 is Ms. Hubbard's response to the government's sentencing memorandum.

Q15. Okay.

A. And, Exhibit 13 are newspaper articles, concerning the case, from local newspapers.

Q16. Okay — the final exhibit, that should be in everybody's packet, that I didn't number, is a small Code of Ethics. And, is this the document that is prepared by the Education

8

and Professional Standards Board?

A. Yes, it is.

Q17. Okay — and, are these — is this document maintained in your office?

A. Yes, it is.

Ms. Seiler: If there is no objection, I would move for entry of Exhibits 1 through 14.

Mr. Hubbard: I have no objection.

HEARING OFFICER: With no objection, they will be entered as Exhibits 1 through 14.

Ms. Seiler: Hearing Officer, that is basically the case — the factual case of the board. At this point, I would close the proof of the board, and reserve any right for any rebuttal witnesses to any proof put on by Mr. Hubbard, although, I believe we have already reviewed documents, and I have stipulated to what he is going to put in, and, then, reserve the right to

9

make oral argument and discuss the possibility of a written position paper, at some time, if it's acceptable. But, at that time, I would — at this time, I would close my proof.

BY THE COURT: Okay — the proof for the board is closed, and, this is Mr. Hubbard's case then.

* * * * *

Supreme Court, U.S.
F I L E D
APR 21 1997
CLERK

No. 96-1504

In The

Supreme Court of the United States

October Term, 1996

CAROL B. HUBBARD,

Petitioner,

vs.

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Kentucky

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. STOPHER
Counsel of Record
BOEHL STOPHER & GRAVES
Attorneys for Respondent
Suite 2300
400 West Market Street
Louisville, Kentucky 40202-3346
(502) 589-5980

70988 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

The petitioner seeks this Court's review based upon the following framed question:

> Whether the Kentucky Education Professional Standards Board may not, consistent with due process, revoke a school teacher's teaching certificate, thereby extinguishing her professional teaching career and livelihood, without presenting any evidence whatsoever that the teacher's "off-duty" conduct impaired her ability to function as a teacher, and where the only evidence presented as to fitness supported her fitness to teach.

PARTIES TO THE PROCEEDING

The parties to this proceeding are as named in the Petition and in this Brief in Opposition.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	2
Introduction	2
A. Hubbard's Criminal Conduct and Conviction	3
B. The Administrative Proceeding	4
C. Judicial Review	10
Reasons for Denying the Writ	11
I. The Hearing Officer, The Standards Board, The Circuit Court And The Court Of Appeals Of Kentucky All Specifically Found A Nexus Between Hubbard's Criminal Misconduct And Her Role As A Teacher. As Construed And Applied In This Case, The Statute Is Clearly Constitutional.	12

Contents

Page

II. The Petitioner Has Shown No Compelling Reason For Review By This Court. 27

Conclusion 27

TABLE OF CITATIONS

Cases Cited:

Alford v. Ingram, 931 F. Supp. 768 (M.D. Ala. 1996) 22

Baker v. School District of the City of Allentown, 371 A.2d 1028 (Pa. 1977) 26

Balog v. McKeesport Area School District, 484 A.2d 198 (Pa. Comm. 1984) 25

Barringer v. Caldwell County Board of Education, 123 N.C. App. 373, 473 S.E. 2d 435 (1996) 25

Board of Education v. McCollum, 721 S.W. 2d 703 (Ky. 1986) 14

Board of Education v. Wood, 717 S.W. 2d 837 (Ky. 1986) 14, 15

Burton v. Cascade School District Union High School No. 5, 353 F. Supp. 254 (D. Ore. 1973) 23, 25

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 22

Contents

	Page
Fiscus v. Board of Trustees of Central School District of Greene County, 509 N.E. 2d 1137 (Ind. App. 1987)	24, 25
Fowler v. Board of Education, 819 F.2d 657 (6th Cir. 1987)	13
Gloster v. General Services Administration, 720 F.2d 700 (D.C. Cir. 1983)	24
Golden v. Board of Education, 285 S.E. 2d 665 (W. Va. 1981)	22
Gover v. Stovall, 237 Ky. 172, 35 S.W. 2d 24 (1931)	14
Governing Board of the Mountain View School District v. Metcalf, 36 Cal. App. 3d 546 (1974)	26
Grayned v. City of Rockford, 408 U.S. 104 (1972)	13
Hainline v. Bond, 824 P.2d 959 (Kans. 1992)	23, 25
Hoagland v. Mount Vernon School District No. 320, 623 P.2d 1156 (Wash. 1981)	24
Kimble v. Worth County R-III Board of Education, 669 S.W. 2d 949 (Mo. 1984)	26
Kolender v. Lawson, 461 U.S. 352 (1983)	24

Contents

Page

Moser v. State Board of Education, 22 Cal. App. 3d 988 (1972) 26

Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969) 24

Pettit v. State Board of Education, 513 P.2d 889 (Cal. 1973) 26

Philips v. Bergland, 586 F.2d 1007 (4th Cir. 1978) .. 24

Thompson v. Southwest School District, 483 S.W. 2d 1170 (W.D. Mo. 1980) 23, 24

Statutes Cited:

18 U.S.C. § 641 4

28 U.S.C. § 1257(a) 1

Ky. Rev. Stat. 161.028 13

Ky. Rev. Stat. 161.120 ..... 5, 10, 13, 24

Ky. Rev. Stat. 161.120(1)(a) 12

Ky. Rev. Stat. 161.790 14

Rule Cited:

Supreme Court Rule 10 27

Contents

Page

APPENDIX

Appendix A — Findings of Fact, Conclusions of Law and Recommendation Dated February 15, 1995 ... 1a

Appendix B — Order Denying Discretionary Review of the Supreme Court of Kentucky Entered January 22, 1997 ..... 17a

The respondent, the Kentucky Education Professional Standards Board, respectfully submits that the Court should deny the petition for a writ of certiorari seeking review of the opinion of the Court of Appeals of Kentucky rendered September 20, 1996.

OPINIONS BELOW

The hearing officer for the Kentucky Education Professional Standards Board rendered findings of fact, conclusions of law, and a recommendation on February 15, 1995. This is reprinted at Appendix 1a to this Brief in Opposition.

The final order of the Kentucky Education Professional Standards Board entered March 21, 1995 is reprinted at Appendix 15a to the Petition.

The judgment of the Franklin Circuit (Kentucky) Court entered July 25, 1995 is reprinted at Appendix 11a to the Petition.

The opinion of the Court of Appeals of Kentucky rendered September 20, 1996 is reprinted at Appendix 1a to the Petition.

The Supreme Court of Kentucky entered an order denying discretionary review on January 22, 1997. This is reprinted at Appendix 17a to this Brief in Opposition.

STATEMENT OF JURISDICTION

The petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Introduction

While unsuccessfully campaigning for the Congress of the United States, the petitioner misused the services of Congressional employees in her own political campaign. These Congressional employees were supposed to be working on the business of a subcommittee of the House of Representatives and the staff of the petitioner's husband, who, at that time, was a member of the House of Representatives. Instead, they were working on the petitioner's political campaign, even using "aliases" to try to conceal their identities and their illegal scheme. Hubbard used these Congressional employees to accompany her at campaign events, to solicit funds for her campaign, and even to prepare her campaign reports to the Federal Election Commission. When confronted with undeniable evidence of her wrongdoing in a federal court in Washington, D.C., Hubbard pled guilty to willfully and knowingly aiding and abetting the theft of Government property.

When confronted with undeniable evidence of her wrongdoing (and also her criminal conviction) in an administrative proceeding relating to her teaching certificate in Kentucky, Hubbard changed her tune, stubbornly minimizing her own involvement and culpability, denying the immoral nature of her criminal misconduct, and ignoring the adverse impact of her conviction on her role as a teacher. For many years, the petitioner had held a teaching certificate, issued by the Commonwealth of Kentucky. Upon receiving word of Hubbard's well-publicized criminal conviction, the Kentucky Education Professional Standards Board ("Standards Board") undertook its statutory mandate to determine whether there was probable cause to revoke Hubbard's Kentucky teaching certificate. Having found probable cause, the Standards Board scheduled

an administrative hearing. Following the administrative hearing and receipt of the hearing officer's findings, conclusions, and recommendation, the Standards Board revoked Hubbard's teaching certificate until July 1, 1997.

Rather than accept the Standards Board's rather modest ruling, Hubbard embarked upon a legal campaign against the Standards Board. Arguing numerous alleged errors, the petitioner, aided by her attorney/brother-in-law, has now obstinately challenged the Standards Board's ruling at four different judicial levels. The previous three levels of judicial decision-makers have all correctly concluded that the Standards Board's order should stand.[1] Hubbard now seeks a fourth level of judicial review in this Court. Her petition should be denied.

A. Hubbard's Criminal Conduct and Conviction

From November, 1990 to May, 1992, Hubbard unsuccessfully campaigned for the United States House of Representatives in Kentucky's Fifth Congressional District in eastern Kentucky. During the petitioner's campaign, her husband, Carroll Hubbard, Jr., was a member of the House, representing Kentucky's First Congressional District in western Kentucky. During her campaign, the petitioner received substantial assistance from certain individuals who were employed either by Representative Hubbard's office or by a certain House subcommittee. These Congressional employees actively participated in the petitioner's campaign, accompanying her at various campaign events, preparing written solicitations for contributions to her campaign, preparing letters

1. The Franklin Circuit (Kentucky) Court and the Court of Appeals of Kentucky both addressed the "merits" of Hubbard's action for judicial review of the administrative decision of the Standards Board. The Supreme Court of Kentucky denied Hubbard's motion for discretionary review, thus permitting the opinion of the Court of Appeals of Kentucky to stand.

acknowledging contributions to her campaign, arranging fundraising events, maintaining the records of her campaign committee, and preparing various reports to the Federal Election Commission.

As a result of this scheme, the United States Attorney for the District of Columbia charged the petitioner with violation of 18 U.S.C. § 641. On April 5, 1994, Hubbard pled guilty to willfully and knowingly aiding and abetting the theft of Government property, specifically the services of those Congressional employees. The information, to which Hubbard pled guilty, is reprinted at 2a and 3a of the Appendix to the Petition. Hubbard was sentenced to a five-year term of probation and ordered to pay restitution in the sum of $26,900 and perform 100 hours of community service.

B. The Administrative Proceeding

Since 1966, Hubbard had held a teaching certificate issued by the Commonwealth of Kentucky. At the time of her guilty plea and conviction, she was employed as a fifth-grade teacher at Radcliff Middle School in Hardin County, Kentucky. As might have been expected, given the nature of Hubbard's political campaign and theft and her husband's public office, Hubbard's conviction was widely publicized. The superintendent of the Hardin County Schools duly notified the Standards Board of the Hubbard's conviction by letter dated April 29, 1994. The superintendent also provided the Standards Board with a copy of the guilty plea executed by Hubbard. The Standards Board subsequently obtained additional documents pertaining to Hubbard's conviction, including copies of the information to which she had pled guilty and the transcripts of her guilty plea and sentencing. The Standards Board determined that there was probable cause to conduct a hearing regarding revocation of the petitioner's teaching certificate. The petitioner was notified of

this decision and, on October 24, 1994, a statement of charges and notice of hearing were issued. The petitioner was charged, under Ky. Rev. Stat. 161.120, with immorality, misconduct in office, and violation of state and federal laws.

A trial-type hearing was conducted on December 13, 1994 by a hearing officer on behalf of the Standards Board. The petitioner was present and represented by counsel, her brother-in-law. At the administrative hearing, the parties stipulated the admissibility of various exhibits and further stipulated that the petitioner had properly and capably performed her classroom duties. The Clerk of the Standards Board authenticated certain documentary exhibits which constituted the majority of the evidence against Hubbard:

1. Teaching Certificate of Carol Brown Hubbard;

2. Letter of April 19, 1994 from Hardin County School Superintendent Lois Gray, with attached copy of Hubbard's guilty plea;

3. Order and cover letter from the Standards Board (stating that there was probable cause to hold hearing);

4. Statement of Charges;

5. Letter of October 31, 1994 from Assistant United States Attorney Thomas Eicher, District of Columbia (the prosecutor in *United States of America v. Carol Brown Hubbard*);

6. Information No. 94-0127 from *United States of America v. Carol Brown Hubbard* (see Exhibit 1, attached);

7. Plea Agreement from *United States of America v. Carol Brown Hubbard* (see Exhibit 2, attached);

8. Transcripts of Guilty Plea and Sentencing from *United States of America v. Carol Brown Hubbard* (see Exhibits 3 and 4, attached);

9. Government's Sentencing Memorandum from *United States of America v. Carol Brown Hubbard*;

10. Hubbard's Sentencing Memorandum from *United States of America v. Carol Brown Hubbard*;

11. Government's Response to Hubbard's Sentencing Memorandum from *United States of America v. Carol Brown Hubbard*;

12. Hubbard's Response to Government's Sentencing Memorandum from *United States of America v. Carol Brown Hubbard*;

13. Newspaper articles concerning Hubbard's criminal conduct; and

14. Standards Board's Teacher's Code of Ethics.

These documents were admitted without objection from the petitioner's counsel.

At the sentencing in the criminal case, the Assistant United States Attorney had provided certain details concerning Hubbard's illegal use of Congressional employees:

> MR. EICHER: . . . WHILE IT'S TRUE THAT THERE IS SOME FLEXIBILITY IN

THE HOURS OF THE EMPLOYEES, WHEN AN EMPLOYEE OF THE HOUSE OF REPRESENTATIVES IS ACCOMPANYING THE WIFE OF A CONGRESSMAN OUTSIDE THE DISTRICT FOR AS MUCH AS A WEEK OR TWO AT A TIME, THERE IS NO QUESTION AS TO THE —

THE COURT: IS THAT WHAT SHE PLED GUILTY TO?

MR. EICHER: YES, YOUR HONOR.

THE COURT: I THOUGHT SHE PLED GUILTY TO SOMEBODY COMING TO HER HOUSE TO STUFF ENVELOPES.

MR. EICHER: NO, YOUR HONOR, THAT WAS AN ELEMENT OF IT. SHE PLED GUILTY TO THE THEFT OF GOVERNMENT SERVICES AND THERE WERE SEVERAL ELEMENTS, ONE WAS TO BENEFIT HER CAMPAIGN EMPLOYEES WOULD COME TO HER HOUSE TO STUFF ENVELOPES BUT, SECOND, HIS EMPLOYEES ACCOMPANIED HER.

THE COURT: WAS THAT SOMETHING SHE PLED GUILTY TO?

MR. EICHER: YES, YOUR HONOR, SHE PLED GUILTY TO THE OFFENSE AND THE OFFENSE CONDUCT, AS SET

FORTH IN THE PRE-SENTENCE REPORT, INCLUDING AND IN FACT PRIMARILY WAS BASED UPON THE FACT THAT HIS STAFF ACCOMPANIED HER TO EASTERN KENTUCKY, OUTSIDE OF MR. HUBBARD'S CONGRESSIONAL DISTRICT, TO CAMPAIGN WITH HER AND THEY DID SO UNDER CIRCUMSTANCES THAT PUT HER ON NOTICE THAT IT WAS IMPROPER AND CERTAINLY AT A MINIMUM SHE CLOSED HER EYES TO THE IMPROPRIETY OF IT, AND I SAY THAT FOR SEVERAL REASONS. THOSE EMPLOYEES USED ALIASES IN THE COURSE OF THEIR WORK FOR HER. SO WHEN THEY WERE TRAVELLING AROUND WITH HER THEY DID SO UNDER ASSUMED NAMES.

SECOND, THERE WAS AN INCIDENT IN WHICH MRS. HUBBARD WAS PRESENT WITH LEANN HOWARD, HER DAUGHTER, AND ONE OF MR. HUBBARD'S STAFF, AND HER DAUGHTER ASKED ABOUT WHETHER OR NOT A CAROLINE HALL WORKED FOR BIG CARROLL, THAT IS MR. HUBBARD, AS WELL. MRS. HUBBARD SHUSHED HER AND SAID DON'T SAY THAT, YOU COULD GET US IN TROUBLE. SO IT'S NOT CORRECT TO SUGGEST THAT SHE HAD NO IDEA THAT THE CONDUCT

SHE WAS THE BENEFICIARY OF WAS IMPROPER.

MRS. HUBBARD WOULD HAVE — SHE WAS A CANDIDATE FOR CONGRESS. SHE WOULD HAVE ACCEPTED THAT. SHE WOULD HAVE BEEN A MEMBER OF CONGRESS HAD SHE WON THE ELECTION. SO SHE'S NOT SOMEONE WHO IS NOT IN A POSITION OF RESPONSIBILITY WITH RESPECT TO THIS CONDUCT.

The transcript of the sentencing was admitted without objection at the administrative hearing.

Hubbard was the only witness to testify in her behalf at the administrative hearing. Despite having pled guilty to the misconduct outlined above, Hubbard testified that she did not believe that her theft was immoral. However, she did admit that, during her unsuccessful campaign, she herself had introduced several of the Congressional employees by aliases, and that she knew that she was introducing them by false names. Hubbard also admitted that she and her campaign had benefitted from the theft of Government property. Hubbard also testified that she thought she was responsible for her own actions. However, subsequent events have shown the hollowness of Hubbard's words regarding responsibility.

In an eight-page report of the administrative hearing, the hearing officer found that Hubbard served as a role model for her students. *See,* Appendix 1a. The hearing officer further concluded that Hubbard's conduct constituted a poor example for her students because of the theft involved and because of the adverse impact on her students. The hearing officer then

concluded that the petitioner's conduct was immoral within the context of Ky. Rev. Stat. 161.120, the Kentucky statute governing the revocation of teaching certificates. The hearing officer further found that there was a "nexus" between her criminal conduct and her role as a teacher. The hearing officer recommended revocation of Hubbard's teaching certificate for one year.

On March 21, 1995, having considered the report of its hearing officer, the Standards Board entered its revocation order. The Standards Board concluded that Hubbard's actions constituted immorality under Ky. Rev. Stat. 161.120 and ordered the revocation of Hubbard's teaching certificate until July 1, 1997 (then slightly more than 27 months from the date of the Standards Board's final order).[2]

C. Judicial Review

On the day after entry of the Standards Board's order, the petitioner began her stubborn pursuit of every possible legal remedy at every possible level to delay the enforcement of the Standards Board's order. Through the procedural maneuvering of her attorney/brother-in-law, Hubbard stymied the enforcement of the Standards Board's revocation order from the date of its entry (March 21, 1995) to February 19, 1997, a few days following this Court's denial of Hubbard's application for a stay. In the name of "judicial review", Hubbard filed every possible appeal, sought every possible stay, and made every possible motion in those two years in a transparent effort to delay the

2. As indicated herein, Hubbard sought judicial review of the Standards Board's order on the day after it was rendered. Due to the procedural maneuvering of her attorney/brother-in-law and a series of injunctions and stays, the petitioner managed to thwart the enforcement of the Standards Board's order from May 21, 1995 to February 19, 1997, shortly after this Court denied an application for a stay. The Standards Board may elect to modify its order in light of the petitioner's procedural game of delay.

enforcement of the revocation order until after July 1, 1997. However, the "merits" of the petitioner's case have now been judicially reviewed by two levels of judicial decision-makers, both of whom have rejected the petitioner's arguments. On July 25, 1995, the Franklin Circuit (Kentucky) Court entered a Judgment upholding the Standards Board's decision. The Court of Appeals of Kentucky rendered its Opinion, also upholding the Standards Board's decision, on September 20, 1996. By Order of January 22, 1997, the Supreme Court of Kentucky, Kentucky's highest court, denied Hubbard's motion for discretionary review. *See,* Appendix 17a. The petition for a writ of certiorari in this Court followed.

REASONS FOR DENYING THE WRIT

Decision-makers at the administrative level, the circuit court level, and the appellate level have consistently concluded that Hubbard's illegal scheme to use Congressional employees for her own political advancement was immoral and had a nexus to her role as a teacher. All of these decision-makers have concluded that Hubbard's criminal misconduct so severely undermined her role as an example to her students that her teaching certificate was properly, though only temporarily, revoked. The relevant Kentucky statute has been construed and applied in a constitutionally proper manner in this case, in keeping with Kentucky law developed over many years. The hearing officer, the Standards Board, the Circuit Court, and the Court of Appeals have all specifically found a sufficient nexus between Hubbard's crime and her role as a moral example to her students. Kentucky's courts have consistently considered the nexus between a teacher's misconduct and the teacher's special role as a moral example to her students. The Standards Board and Kentucky's courts considered this nexus in Hubbard's case also. The statute has consistently been constitutionally construed and applied, as it was here. The time has come for

the petitioner to cease her meritless crusade against the Standards Board and let the implementation of the revocation order proceed. The petition should be denied.

I.

THE HEARING OFFICER, THE STANDARDS BOARD, THE CIRCUIT COURT AND THE COURT OF APPEALS OF KENTUCKY ALL SPECIFICALLY FOUND A NEXUS BETWEEN HUBBARD'S CRIMINAL MISCONDUCT AND HER ROLE AS A TEACHER. AS CONSTRUED AND APPLIED IN THIS CASE, THE STATUTE IS CLEARLY CONSTITUTIONAL.

Ky. Rev. Stat. 161.120(1)(a) provides:

> **Any certificate** issued under KRS 161.010 to 161.100, or any certificate or license issued under any previous law to superintendents, principals, teachers, supervisors, directors of pupil personnel, or other administrative, supervisory, or instructional employees **may be revoked by the Education Professional Standards Board for immorality**, misconduct in office, incompetency, violation of the school laws of the state or administrative regulations adopted by the State Board for Elementary and Secondary Education, willful neglect of duty, conviction of a misdemeanor offense under KRS Chapter 510 involving a student, or a felony offense under KRS Chapter 510, 530.064, or 531.310, or being found by the Education Professional Standards Board to have had sexual contact as defined in KRS 510.010(7)

> with a student, or upon the determination that a certificate applicant presented or declared false information toward obtaining the issuance or renewal of any type of teacher certification.

The Standards Board is composed of 15 members — eight teachers, two school administrators, one local board of education member, two deans of colleges of education, the executive director of the Kentucky Council on Higher Education, and the chief state school officer. Ky. Rev. Stat. 161.028. Eight of the 15 are undeniably Hubbard's "peers", who understand firsthand the importance of a teaching certificate, as well as the compelling interest in promoting minimum standards for the teaching profession. The Standards Board is uniquely qualified to fulfill the role delegated to it by Kentucky's General Assembly. Hubbard proudly points to the gracious comments of the sentencing federal judge in her criminal case. However, the Kentucky General Assembly empowered Kentucky's Standards Board, not a federal judge in the District of Columbia, to revoke teaching certificates in Kentucky. A "jury" of Hubbard's "peers" revoked her teaching certificate.

In the Franklin Circuit Court and the Kentucky Court of Appeals, Hubbard's chief contention was that Ky. Rev. Stat. 161.120 was unconstitutionally vague because it did not contain a definition of "immorality". Hubbard's argument was and is seriously flawed. *See, e.g., Grayned v. City of Rockford,* 408 U.S. 104 (1972); *Fowler v. Board of Education,* 819 F.2d 657 (6th Cir. 1987). It appears that Hubbard has abandoned that argument in this Court.

Hubbard now argues that there was insufficient evidence presented at the administrative hearing to support the conclusion that there was a nexus between Hubbard's criminal conduct and her exemplary role as a teacher. We respectfully submit that

this Court need not waste further judicial resources to perform basic judicial review of the sufficiency of evidence at an administrative hearing. This is especially true where, as here, two other courts have already reviewed the administrative record in considerable detail and have both concluded that, under Kentucky law, there was sufficient evidence of a nexus.

Kentucky has long recognized the special role of public school teachers. As early as 1931, Kentucky's highest court observed that a public school teacher is to be regarded "in the light of an exemplar whose conduct might be followed by his pupils". *Gover v. Stovall,* 237 Ky. 172, 35 S.W. 2d 24 (1931); *see also Board of Education v. McCollum,* 721 S.W. 2d 703 (Ky. 1986). Hubbard has cited *Board of Education v. Wood,* 717 S.W. 2d 837 (Ky. 1986), as supporting her position. It actually supports the Standards Board's order. In *Wood,* two teachers were terminated from their employment by a Kentucky school district for smoking marijuana with two minor students. Their termination was based upon another Kentucky statute which permits local boards of education to terminate the employment of a teacher who has engaged in "immoral conduct". Ky. Rev. Stat. 161.790. The termination was upheld on appeal. The Kentucky Supreme Court emphasized:

> The purpose of teacher tenure laws is to promote good order in the school system by preventing the arbitrary removal of capable and experienced teachers by political or personal whim. **It is not to protect those who violate the criminal law. A teacher is held to a standard of personal conduct which does not permit the commission of immoral or criminal acts because of the harmful impression made on the students. The school teacher has traditionally been regarded as a moral example for the students.**

(Emphasis added) *Id.* at 839. Based upon this view of proper standards for teachers, the Kentucky Supreme Court had no difficulty in concluding that the Wood brothers had engaged in immoral conduct which justified their termination by the Hopkins County Board of Education.

Following the resolution of the merits of the *Wood* case, Justice Wintersheimer commented upon other aspects of teacher termination cases, and discussed the concept of nexus. However, this portion of the opinion was not directly related to the resolution of the issue before the Court. Moreover, Justice Wintersheimer was clearly focusing on private conduct unrelated to a teacher's role as an example:

> It was not the intention of the legislature to subject every teacher to discipline or dismissal for **private** shortcomings that might come to the attention of the Board of Education but have no relation to the teacher's involvement or **example** to the school community.

(Emphasis added). 717 S.W. 2d at 840.

Hubbard's conduct was far from a "private shortcoming". It was clearly related to her role as an example to her students and the school community.

Hubbard committed her crime while seeking election to the United States House of Representatives. She willfully and knowingly violated a federal criminal statute resulting in the theft of more than $26,000 of the public's money. At public campaign events, she introduced public employees by false names to try to conceal the illegal scheme. She engaged in a public crime for which she was rather publicly convicted. Both

her theft and her conviction for that theft received substantial attention in the public media throughout the Commonwealth of Kentucky. This was not a private concern. It was a gross and public abuse of a public trust by a person seeking a public office of considerable power and influence.

Moreover, this very public crime clearly related to Hubbard's role as an example to her students and the school community, as found by the hearing officer, the Standards Board, the Franklin Circuit Court, and the Kentucky Court of Appeals. Hubbard must be viewed as an exemplar, whose conduct might be followed by her impressionable students. Hubbard engaged in immoral conduct which directly undermined her exemplary role as a teacher. Every decision-maker so far has agreed with these conclusions. The temporary revocation of Hubbard's certificate was and is supported by Kentucky law.[3]

Hubbard seems to contend that the Office of Teacher Education and Certification (which presented the administrative case against Hubbard) was obliged to present opinion testimony at the administrative hearing concerning the role of a teacher as a moral example to her students. This argument is patently ridiculous. The law of Kentucky on this point is clear, as expressed in the above authorities. In Kentucky, a teacher must fulfill a role as a moral example to her students. Neither the hearing officer nor the Standards Board needed any further guidance or opinion testimony on the role of a teacher. Indeed,

---

3. Hubbard has dramatically argued here that the Standards Board's order will deprive her of her career and livelihood. There is no evidence that, without a teaching certificate, Hubbard will be unable to obtain employment or become a ward of the state. Further, the Standards Board's order, as it currently stands, will expire on July 1, 1997. Although Hubbard's teaching certificate was revoked, the revocation order was not, by its own terms, permanent. Thus, the order could not have delivered the crushing, permanent blow which the petitioner's rhetoric in this Court would suggest.

given the membership of the Standards Board, the courts would be well justified in according deference to the Standards Board on such matters. At the administrative hearing, ample evidence was presented, without objection from Hubbard or her attorney, concerning the nature of her criminal misconduct and her guilty plea.

The petitioner seems to imply that the evidence against Hubbard should have been presented orally, rather than in the form of documentary exhibits. Whether that evidence was presented in the form of documents or oral testimony is utterly insignificant. The records from Hubbard's criminal case spoke volumes. Moreover, if the petitioner truly objected to the written, as opposed to oral, presentation of evidence, she should have objected then and there. When these 14 documentary exhibits were introduced at the administrative hearing, the petitioner's counsel had but one comment:

I have no objection.

Also, at the administrative hearing, Hubbard admitted certain details about her own use of "aliases" for the Congressional employees in an attempt to conceal their true identities and the illegal scheme. Given Kentucky's long-standing law concerning the special role of teachers, the hearing officer and the Standards Board correctly concluded that Hubbard's well-publicized conviction of theft in a high-profile race for public office undermined her effectiveness as a moral example to her students.

In his remarks at Hubbard's sentencing, Hubbard's own criminal attorney certainly recognized the nature of her crime and its effect on her role as a teacher in a "community with values":

WE THINK UNDER THE CIRCUMSTANCES IT'S GOING TO BE

> **A STRUGGLE FOR HER TO CONTINUE TO TEACH IN A COMMUNITY THAT HAS, I GUESS, VALUES** AND I DON'T KNOW, MAYBE IN WASHINGTON, D.C. PLEADING TO A MISDEMEANOR AND AN AIDER AND ABETTOR AND HAVING THE COURT IMPOSE A SENTENCE OF PROBATION ON YOU MAYBE IS NO BIG THING AND MAYBE THAT SAYS A LOT ABOUT WASHINGTON AND MAYBE IT SAYS TOO MUCH, **BUT I ASSURE YOU IN PLACES WHERE MRS. HUBBARD LIVED IN KENTUCKY THAT'S NOT A LITTLE DEAL. THIS IS NOT AS INNOCENT AS A PARKING TICKET. THIS IS SOMETHING THAT COULD AFFECT THE REST OF HER LIFE.**

Hubbard's criminal attorney apparently realized the gravity of the offense she had committed and its effect on her role as a teacher. It is time for Hubbard and her current attorney to accept the same ideas.

The hearing officer considered Hubbard's nexus argument and concluded:

> Respondent and all teachers serve as role models for students. Respondent's conviction of this misdemeanor demonstrates her disregard for the laws of the United States: Respondent participated in the misuse of federal employees, and she personally and her campaign benefited when the government paid employees to perform campaign duties

> for her campaign. This conduct sets a bad example for students, both as to theft generally, and, even more importantly in a country whose democratically-elected government relies on the fairness of its elections, as to how election campaigns should be conducted.
>
> * * *
>
> In addition to a teacher serving as role model to students, teachers are called upon to teach, at every level, subjects related to government and citizenship. Respondent's conviction of an election-related theft is necessarily related to her teaching certificate. There is sufficient nexus between Respondent's conviction and her work as a teacher for this Board to take action in this case.

The Circuit Court addressed the nexus argument very specifically and ruled:

> To determine what immoral acts subject a teacher to discipline, the Board must look at the facts and circumstances of each case. While conviction of a crime will not automatically lead to revocation of a certificate, it is one factor to be considered. The facts in Hubbard's case show she was convicted of aiding in the theft of government property. At a time when Hubbard should have been an example of leadership, responsibility, and honesty, she chose to take government property for her own benefit.

> Her actions are immoral and a poor example for her students. Thus, the Board had substantial evidence for its finding that Hubbard's actions constitute immorality under KRS 161.120(1)(a).

Similarly, the Kentucky Court of Appeals found a nexus between Hubbard's high-profile theft and her role as a teacher:

> Alternatively, Hubbard argues that revocation of her teaching certificate was improper because there is no nexus between her conviction and her performance as a teacher. Discussing a different, but related statute, KRS 161.790, in *Board of Educ. of Hopkins County v. Wood,* Ky., 717 S.W. 2d 837, 840 (1986), the Supreme Court said that "the [allegedly immoral] conduct, when it occurs in a context other than professional competency in the classroom[,] should have some nexus to the teacher's occupation. . . ." Providing for the termination of a teacher's contract for "[i]mmoral character or conduct unbecoming a teacher," KRS 161.790(1)(b) is substantially similar to KRS 161.120(1)(a) which provides for the revocation of teaching certificates. The similarity of KRS 161.120(1)(a) and KRS 161.790(1)(b) leads us to an interpretation of KRS 161.120(1)(a) requiring the alleged immorality to "have some nexus to the teacher's occupation." *Id.* at 840.
>
> Since "[t]he school teacher has traditionally been regarded as a moral example for the

students," the required nexus is satisfied if the teacher's conduct is of the type that tends to make a "harmful impression . . . on the students." *Board of Educ. of Laurel County v. McCollum,* Ky., 721 S.W. 2d 703, 705 (1986). Speaking to the nexus issue in this case, the circuit court stated:

> The facts in Hubbard's case show she was convicted of aiding in the theft of government property. At a time when Hubbard should have been an example of leadership, responsibility, and honesty, she chose to take government property for her own benefit. Her actions are immoral and a poor example for her students. Thus, the Board had substantial evidence for its finding that Hubbard's actions constitute immorality under KRS 161.120(1)(a).

A nexus has been identified and we, like the circuit court, will not substitute our judgment for that of the EPSB. *See Kentucky Bd. of Nursing v. Ward,* Ky. App., 890 S.W. 2d 641, 642 (1994) (emphasizing that an appellate court is not to "substitute its judgment as to the credibility of the witnesses and/or the weight of the evidence concerning questions of fact" in administrative matters).

A teacher in Kentucky must not only be able to learn certain subject matter and convey it to her students, but must also serve as a good moral example to her students. Kentucky law makes

it clear that the fitness of a teacher in Kentucky is not to be judged solely on the basis of skill in communicating information to others. Hubbard's view of the role of a teacher is far too narrow and is contrary to well-established and long-standing Kentucky law.

Hubbard has cited a number of cases from sister jurisdictions, many of which actually support the result in this case. For example, in *Alford v. Ingram*, 931 F. Supp. 768 (M.D. Ala. 1996), a District Court upheld the constitutionality of an Alabama statute which permitted dismissal of teachers for immoral conduct or unbecoming or indecent behavior. The Court noted that the statute was subject to a limiting construction which rendered it constitutional.

Even Hubbard admits that a facially unconstitutional statute may be rendered constitutional by a limiting construction. Petition for Writ of Certiorari, p. 6. The statute in this case is subject to a limiting construction and has received such a limiting construction at three different levels. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). Although the statute does not expressly require a nexus between the immoral conduct and the teacher's role, the hearing officer, the Standards Board, the Franklin Circuit Court, and the Kentucky Court of Appeals have all found such a nexus. As construed in this case and as applied to Hubbard, the Kentucky statute is constitutional.

Hubbard now seems to place primary reliance on *Golden v. Board of Education*, 285 S.E. 2d 665 (W. Va. 1981). Interestingly, Hubbard never cited this opinion until her petition in this Court. However, *Golden*, like *Alford* and others, merely stands for the proposition that a statute permitting dismissal of a teacher for immoral conduct is constitutional if there is a rational connection between the immoral conduct and the teacher's fitness or the school community. *Golden* also involved

some dramatically different facts and extenuating circumstances. The teacher in that case had been convicted of shoplifting. The evidence revealed that, at the time of the shoplifting, the teacher was "totally distraught". She was in the process of placing her aged, crippled mother, a mugging victim, in a nursing home and had just heard from her sixteen-year-old daughter that she had wrecked the family car. The teacher absentmindedly picked up some items, left the store, and was walking back into the store, when she was arrested. Further, the West Virginia Supreme Court of Appeals found that the shoplifting conviction was void because the judge had acted without jurisdiction. No such extenuating circumstances are present in the instant case.

Hubbard's reliance upon *Thompson v. Southwest School District,* 483 S.W. 2d 1170 (W.D. Mo. 1980), is not supported by the language of the opinion. In *Thompson,* the court was not faced with deciding whether the Missouri statute at issue was unconstitutionally vague. Rather, the court was considering a motion for a preliminary injunction and performing an analysis of whether, under the applicable standard for injunctive relief in the Eight Circuit, the movant had shown that there was a serious question on the merits which made the issue a fair ground for litigation. The court in *Thompson* did not express an opinion as to whether the statute in question was unconstitutionally vague and eventually concluded that the question of vagueness would not need to be reached under the facts of the case.

Hubbard relies upon *Burton,* 353 F. Supp., at 254, a two-page opinion written in 1973 by a federal district judge in Oregon. As indicated above, *Burton* was persuasively distinguished by the Kansas Supreme Court in *Hainline,* and the Standards Board submits that the *Hainline* decision is in keeping with Kentucky law in this area.

Some of the non-Kentucky cases cited by Hubbard involve

conduct which could be construed as "private". It is clear that the conduct in those cases is quite different from Hubbard's theft from public coffers and breach of the public trust. *Thompson v. Southwest School District*, 483 F. Supp. 1170 (W.D. Mo. 1980), involved a romantic relationship between adults in which there was no criminal activity. The *Thompson* case bears no relationship at all to the facts of the present case. Further, the decision in *Hoagland v. Mount Vernon School District No. 320*, 623 P.2d 1156 (Wash. 1981), fails to consider the teacher's special role under Kentucky law as a moral example to her students and does not comport with the language of Ky. Rev. Stat. 161.120.

Several of the cases cited by Hubbard have no or, at best, tangential relevance to this case. For example, *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), involved the dismissal of a civil service employee for a homosexual advance. It has no relevance to the special role of a teacher under Kentucky law. *Gloster v. General Services Administration*, 720 F.2d 700 (D.C. Cir. 1983), dealt with the dismissal of a GSA custodian for welfare fraud. The petitioner has failed to show how this could be relevant to a teacher certification case in Kentucky. The loitering statute considered in *Kolender v. Lawson*, 461 U.S. 352 (1983), similarly has no relevance to the subject case. Likewise, *Phillips v. Bergland*, 586 F.2d 1007 (4th Cir. 1978), involving the discharge of a civil service employee for placing twine around the neck of a fellow employee, is inapplicable.

Several sister jurisdictions have rendered decisions which are supportive of the Standards Board's position here. At least one jurisdiction has recognized that immorality on the part of a teacher extends to any conduct which offends the morals of the community and is a bad example to the youth for whom the teacher is responsible. *Fiscus v. Board of Trustees of Central School District of Greene County*, 509 N.E. 2d 1137 (Ind. App.

1987). At least one other jurisdiction has recognized that dishonesty alone may constitute immoral conduct. *See Balog v. McKeesport Area School District*, 484 A.2d 198 (Pa. Comm. 1984).

In *Hainline v. Bond*, 824 P.2d 959 (Kans. 1992), a teacher's certificate was suspended after he was convicted of burglary. The teacher challenged this suspension on, among other grounds, the question of whether the Kansas statute proscribing immoral behavior was unconstitutionally vague. Like Hubbard, the teacher in *Hainline* relied upon the decision in *Burton v. Cascade School District Union High School No. 5*, 353 F. Supp. 254 (D. Ore. 1973). The decision in *Burton* notwithstanding, the *Hainline* court concluded that the Kansas statute was not impermissibly vague, reasoning that the legislature could not be expected to include every possible scenario or example of misconduct when drafting a general statute. "The term 'immorality' as used in [the statute] means such conduct that by common judgment reflects on a teacher's fitness to engage in his or her profession." *Id.* at 967. Applying that standard to the present case, it is clear that, as the hearing officer concluded, Hubbard's conviction could not help but reflect on her fitness to mold young minds.

Other jurisdictions are replete with examples of teachers whose employment was terminated or whose teaching certificates were revoked because of criminal conduct occurring outside the classroom. In *Barringer v. Caldwell County Board of Education*, 123 N.C. App. 373, 473 S.E. 2d 435 (1996), the Court upheld the dismissal of a tenured teacher who entered a crowded poolroom with a fully-loaded shotgun and a pistol and indicating a "violent intent". The North Carolina statute permitted dismissal for "immorality". The teacher argued that "immorality" was unconstitutionally vague and that the statute did not require a "nexus" between conduct and teaching performance. Following a fairly comprehensive review of the

law of sister jurisdictions, the North Carolina Court upheld the statute and the dismissal, noting that a majority of states have reached similar results in similar cases.

In *Pettit v. State Board of Education*, 513 P.2d 889 (Cal. 1973), the teacher was convicting of a misdemeanor charge of outraging public decency following her arrest for participating in a group sex party. Proceedings were then initiated to revoke her teaching credentials. The California Supreme Court upheld the revocation of the teaching credentials, noting that the teacher was to act as an example to her students and that she clearly had not done so because of her "illegal and indiscreet actions." *Id.* at 894. Similar results have been reached under similar circumstances. *Moser v. State Board of Education*, 22 Cal. App. 3d 988 (1972) (upholding revocation of teaching certificate following conviction of sexual and homosexual acts in a public restroom); *Governing Board of the Mountain View School District v. Metcalf*, 36 Cal. App. 3d 546 (1974) (upholding termination following teacher's conviction of prostitution after an encounter in a public restroom); *see also Kimble v. Worth County R-III Board of Education*, 669 S.W. 2d 949 (Mo. 1984) (upholding dismissal of teacher for "immoral conduct" based upon the taking of the property of others, even though the property was returned) *and Baker v. School District of the City of Allentown*, 371 A.2d 1028 (Pa. 1977) (upholding dismissal, on ground of immorality, of school district employee who had entered plea of *nolo contendere* to charge of operating illegal gambling business).

Under Kentucky law, the teacher's role as a moral exemplar is paramount. The evidence was more than sufficient to show a nexus between Hubbard's criminal conduct and her role as an example to her students and the community. Two courts have already specifically reviewed the administrative record and so determined. Further review by this Court is unnecessary.

II.

THE PETITIONER HAS SHOWN NO COMPELLING REASON FOR REVIEW BY THIS COURT.

Pursuant to Supreme Court Rule 10, the petitioner must show compelling reasons for review on certiorari. The petitioner has shown no reason, compelling or otherwise, for this Court to review this case.

The relevant Kentucky statute has been construed and applied to Hubbard by a Kentucky administrative agency and Kentucky's courts in conformity with long-standing Kentucky law. There is no important question of federal law here. There is no conflict between federal circuit courts of appeals pertinent to this case. There is no conflict between a federal circuit court of appeals and a Kentucky court pertinent to this case. The petition should be denied.

CONCLUSION

The respondent, the Kentucky Education Professional Standards Board, respectfully submits that the petition should be denied.

Respectfully submitted,

ROBERT E. STOPHER
Counsel of Record
BOEHL STOPHER & GRAVES
Attorneys for Respondent
Suite 2300
400 West Market Street
Louisville, Kentucky 40202-3346
(502) 589-5980

APPENDIX A — FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION DATED FEBRUARY 15, 1995

COMMONWEALTH OF KENTUCKY
EDUCATION PROFESSIONAL STANDARDS BOARD

IN RE: THE TEACHING CERTIFICATE OF

CAROL BROWN HUBBARD

RESPONDENT

KENTUCKY CERTIFICATE NUMBER 402-48-4266

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

**** **** **** ****

This matter came before Mary-James Young, Hearing Officer for the Education Professional Standards Board, on December 13, 1994 in room G-1, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky. The Office of Teacher Education and Certification was present, represented by the Honorable Marcia Ford Seiler. The Respondent Certificate Holder, Carol Brown Hubbard, was present in person and represented by the Honorable Kyle T. Hubbard. This proceeding was designated a private hearing, at the request of counsel for the Respondent. A person identified by Counsel for the Respondent as Ms. Hubbard's daughter stayed in the hearing room, at the request of the Respondent.

Appendix A

SUMMARY OF PROCEEDINGS

1. The Respondent certificate holder, Carol Brown Hubbard, was mailed a Statement of Charges dated October 24, 1994. In that Statement of Charges, Respondent was notified that a report had been made to the Education Professional Standards Board pursuant to KRS 161.120, and that her Kentucky Teaching Certificate was subject to revocation. The specific charges against Ms. Hubbard were set out in numbered paragraphs 1-5, as follows:

A. Respondent's certificates which are subject to revocation are a provisional elementary certificate, grades 1-8 (expiration date: LIFE), approval for teaching kindergarten (expiration date: LIFE).

B. On May 2, 1994, the Education Professional Standards Board received a report from Lois Gray, Superintendent, Hardin County Schools. Ms. Gray advised that the Respondent was a fifth grade teacher at Radcliff Middle School in the Hardin County School System. Ms. Gray stated that Respondent entered a plea of guilty in the case of United States of America v. Carol Brown Hubbard, Case No. 94-0127.

C. On March 28, 1994, the Respondent entered into a guilty plea agreement with the United States Attorney Special Assistant. This agreement was in settlement of the criminal case against her in United States District Court in the District of Columbia. The Respondent pursuant to the agreement, pleaded guilty to "one (1) misdemeanor count of aiding and abetting a violation of Title 18, United States Code, Section 641, arising from the Defendant's

(Respondent's) aiding and abetting and indirectly causing the conversion and theft of a thing of value, that is the services of employees of the United States House of Representatives assigned to the office of Carroll Hubbard, Jr."

D. The Respondent was subsequently sentenced on the guilty plea as follows:

1. Five (5) years probation;

2. Repayment of $26,900.00 in restitution for the value of work done by the employees;

3. 100 hours of community service work.

E. The above mentioned conduct is clearly evidence of the willful and knowing violation of the Respondent of federal and state laws. The conviction of this misdemeanor received much publicity and notoriety within the community and the State of Kentucky at large. The conviction is clearly conduct enumerated in KERA's 161.120 as an act of immorality or misconduct in office and therefore grounds for revocation or suspension of the Respondent's teaching certificate.

2. The Respondent holds a Bachelor's Degree from Eastern Kentucky University, with a planned fifth-year program from Eastern Kentucky University. Respondent holds Rank 2.

3. The federal misdemeanor charge and guilty plea arose from Respondent's conduct during her 1992 campaign for federal office — the Kentucky Fifth District Congressional race in 1992. In 1984, the Respondent had resigned her teaching

position to move to Washington, D.C. with her husband. The Respondent resumed her teaching career in 1993.

4. The allegations which form the basis of this revocation proceeding occurred as follows: the Respondent entered a guilty plea to a federal misdemeanor charge in May, 1994, and the charge was based on Respondent's conduct during that 1992 congressional race.

5. Prior to the hearing, Counsel for the Respondent filed her Response to the Statement of Charges, and her Request for Documents and Interrogatories to the Professional Standards Board. Counsel for the Board answered the Interrogatories and provided documents to the Respondent. Also prior to the hearing, the parties presented a stipulation to the hearing officer (admitted as Respondent's Exhibit 1). That stipulation stated in part as follows:

> A. "Carol Brown Hubbard has properly and capably performed and fulfilled her duties as a teacher throughout her career at the following schools . . .";
>
> B. That in the Transcript of Sentencing before the Honorable Louis R. Oberdorfer, United States District Judge, dated June 30, 1994, Judge Oberdorfer made statements, at p. 23 "I am satisfied that you're a victim and not a perpetrator and I'm satisfied that you're thoroughly remorseful . . ."; at p. 24 "you obviously led a productive and a very useful life as a teacher and I hope that despite your present difficulties you can resume and the authorities in Kentucky will permit you to resume your teaching career, wise for this experience"; at p. 25 "having said all that I wish for you an opportunity to return to your career as a teacher and hopefully spend an useful life.";

C. The parties stipulate the Guilty Plea Agreement dated March 28, 1994.

D. The parties stipulate that letters from certain school principals will be admitted into evidence as the testimony of the writers.

5. The Office of Teacher Education and Certification also presented testimonial evidence to support the charges against the Respondent.

Ms. Teri Eversole, Clerk, Education Professional Standards Board

Ms. Eversole testified that she keeps the official files for the Board, as part of her duties as Clerk, including the file on the Respondent. Exhibits from the file, including Respondent's teaching certificate and the initial complaint were introduced in evidence, along with pleadings obtained from the United States Department of Justice, newspaper articles, and a copy of the Kentucky School Personnel Code of Ethics.

6. Respondent moved for a directed verdict, at the close of the evidence presented by Counsel for the Board. This hearing officer overruled that motion, finding that the counsel for the Board had met its burden of proof, considering the evidence in the light most favorable to the non-moving party. Respondent also argued that the term "immorality" in KRS 161.120 is unconstitutionally vague or overbroad. This hearing officer overruled that motion, finding that the term "immorality" as used in KRS 161.120 is not vague or overbroad. Respondent also argued that there was no "nexus" between the Respondent's conviction of a federal misdemeanor and her teaching certificate.

This hearing officer overruled that motion, finding, again in the light most favorable to the nonmoving party, that the Board had offered proof of a connection between the conviction and the Respondent's certification as a teacher. The Respondent then presented testimonial evidence and documentary evidence in defense of the charges against her.

Carol Brown Hubbard, the Respondent

Carol Brown Hubbard testified that she currently lives in Elizabethtown, Hardin County, Kentucky, and that she teaches fifth grade in Vine Grove at the Brown Street Education Center. Last school year, Respondent taught at Radcliff Middle School. Respondent testified that she resigned her teaching position in 1984, after her marriage, to move to Washington, D.C. with her husband. She resumed her teaching in 1993, at Radcliff Middle School. Respondent stated that she never had any charges stemming from her teaching.

Respondent testified that she was a candidate for federal office in 1992, when she ran for election to Congress, for the old fifth congressional district in Kentucky. She stated that Hardin County, where she currently lives, is not in the fifth district. Respondent stated that she was charged with using federal employees in her campaign, and that some of her husband's government employees assisted her with her campaign. Respondent stated that she had been told that the employees were on vacation and on their time off, and that she did not ask for assistance from these employees. Respondent testified that she was not aware that the employees were working on her campaign while they were on government time.

Respondent testified that she agreed to plead guilty because

her attorney in Washington had concluded that the guilty plea would not affect her teaching in Kentucky. She also cited the uncertainty of the outcome of a trial and the "huge expense" of representation during a trial as factors in her decision to plead guilty.

Respondent stated that she had been required to pay restitution of $27,000.00 and to perform 100 hours of community service as part of her sentence on her guilty plea.

Respondent stated that the two newspaper articles referred to by counsel for the Board were from the Lexington Herald Leader, a newspaper not distributed in Hardin County, and from the Paducah Sun Democrat, another paper not distributed in Hardin County.

Respondent testified that her conviction has not affected her relationships with students, other teachers or administrators, and that Superintendent Gray has been "very supportive" of her, as have been her two principals in Hardin County. Respondent referred to the letters of support from her two principals.

Respondent stated that she had no intention of running for public office again, and that there was "no likelihood" that she would commit this kind of violation again. Respondent testified that when the violation occurred she was not teaching and she was not living in Hardin County.

Respondent testified that "many laws and regulations" apply to a federal election campaign, and that she had intended to comply with all state and federal laws and to run "the best campaign possible." Respondent further testified that her conviction had not affected her ability to teach, but that it had made her a wiser and better person.

Appendix A

Respondent testified that there was "no connection" between her conviction and her teaching in Hardin County. Respondent stated that she takes great pride in teaching, and that she enjoys, loves and looks forward to teaching. Respondent testified that she considers herself to be "very moral and Christian" and that she did not agree that her conviction reflected any immoral conduct.

On cross examination, the Respondent admitted to having pleaded guilty and admitted the authenticity of her guilty plea agreement and the Information. Respondent stated that she had agreed to plead guilty to the charge in the Information. Respondent stated that she pleaded guilty to use of federal employees being paid by the government while they worked on her campaign. Respondent stated that she was aware that the employees used aliases. She stated that she never asked an employee to use an alias. Respondent admitted to introducing employees by their aliases, because those employees had asked her to do so. Respondent stated that the employees cited "personal reasons" for using aliases when they worked on her campaign.

Respondent testified that her husband and the employees told her that the employees were using "vacation time" when they worked on her campaign. Respondent testified that both her campaign and she personally benefited from the work that her husband's federal employees did on her campaign, stating that the employees "were skilled in ways to help a candidate." Respondent admitted that a candidate is responsible to abide by the laws and to be aware of the laws.

Respondent testified that she "believed and trusted" her husband and the "road he was setting" for her to travel.

Respondent testified that she is responsible for her own actions and that she should not have put as much faith in her husband as she did. Respondent stated that her husband is highly respected in the first congressional district of Kentucky, and that part of a marriage is faith in each other. Respondent stated that she did not "go and read all the rules" because of her belief that her husband would not lead her astray.

Respondent testified that she was not "recently aware" of the Code of Ethics, but she agreed that she should be bound by the Code of Ethics. Respondent stated that she did not consider a conviction of a federal misdemeanor related to a campaign to be a violation of teacher ethics — "not the type of misdemeanor" for which she was convicted.

7. At the close of his case, Respondent renewed her motion for a directed verdict, and the hearing officer overruled the motion, finding insufficient grounds to grant the motion.

8. Also at the close of the case, counsel for the Board asked for and was granted an opportunity to address issues of law raised by counsel for Respondent, by legal brief. The hearing officer set a "briefing schedule" for issues of law raised in the case; both counsel state that the facts in this case are not in dispute. Respondent's and Plaintiff's briefs were to be due 1/6/95, with the Plaintiff's reply brief due 1/13/95. After the close of the hearing, counsel for the plaintiff sought and was granted an extension to file her brief, and counsel for the respondent filed his reply brief following his receipt of the plaintiff's brief, on or about 1/18/95.

Appendix A

FINDINGS OF FACT

1. Respondent stands convicted of a federal misdemeanor under 18 United States Code 641, Theft of Government Property, for "aiding and abetting and indirectly causing the conversion and theft of a thing of value, that is the services of employees of the United States House of Representatives assigned to the offices of Carroll Hubbard, Jr." Board Exhibit 7, Guilty Plea Agreement. The statutory maximum sentence for that offense is up to one year imprisonment.

2. Respondent was a candidate for federal office in 1992. She sought the congressional seat in the fifth congressional district of Kentucky.

3. Respondent admits to having used employees from her husband's congressional office, who were on the federal payroll at the time that they worked for her campaign, in her own congressional campaign, and Respondent admits that some of those employees used aliases while campaigning for her. Respondent also referred to those employees by their aliases during her campaign.

4. In the transcript of the sentencing hearing on Respondent's guilty plea, the prosecutor recounted the specific acts which constituted this violation of the federal law. And, during the prosecutor's statement to the court, he recounted an incident where Respondent told her daughter not to question whether a particular campaign worker also worked for Respondent's husband by stating that "you could get us in trouble." Respondent's Exhibit 4, p.16. Neither Respondent nor her counsel questioned the accuracy of the prosecutor's statement to the Court, either during that sentencing hearing or

during this hearing before the Education Professional Standards Board.

5. Respondent admits that she personally benefited and that her campaign benefited from the use of federal government employees in her campaign.

6. For her conviction, Respondent was sentenced to five years on probation, and she was also sentenced to perform 100 hours of community service, and to pay restitution in the amount of $27,000.00.

7. At the time of this offense, in 1992, the Respondent was not employed as a teacher, but she was a certificate holder.

8. Respondent resumed her teaching in 1993, and is currently teaching in the Hardin County Schools.

CONCLUSIONS OF LAW

1. Pursuant to KRS 161.028, the Education Professional Standards Board is duly authorized and responsible for establishing teaching standards and requirements for obtaining and maintaining, issuing, renewing, suspending, and revoking teaching certificates.

2. Pursuant to the provisions of KRS 161.120, the Education Professional Standards Board may revoke a teaching certificate for immorality, misconduct in office, incompetency, violation of the school laws or the state or administrative regulations adopted by the state board for elementary and secondary education, willful neglect of duty, or upon the determination that a certificate applicant has presented or

declared false information toward obtaining the issuance or renewal of any type of teacher's certification.

3. The Education Professional Standards Board has jurisdiction of the parties and subject matter herein, and all notices required by KRS 161.120 have been submitted, received, and filed in a timely manner.

4. There is here no violation of state school laws, and that aspect of the charge has been dismissed by agreement of the parties.

5. Although the Respondent was not actively teaching at the time of her conviction, she was a certificate holder at the time of this offense. The term "misconduct in office" is not limited to misconduct within the classroom. The term "misconduct in office" as used in KRS 161.120, has long been interpreted by Kentucky courts as having "broad scope" and Kentucky courts have long held that the term "misconduct in office"

> is more comprehensive than 'immoral conduct,' or 'immorality,' since the acts composing them must necessarily be immoral in their nature. But conduct might not be intrinsically immoral and yet be 'misconduct' as growing out of the status and social relationship of the one engaged in it. According to the text in 40 CJ 1220, it is defined as 'bad behavior; improper conduct; mismanagement; or wrong conduct, in usual parlance, a transgression of some established and definite rule of action, where no discretion is left, except what necessity may demand.

Appendix A

Kentucky State Board of Education v. Isenberg, Ky 412 SW 2d 81, 84 (1967), citing Gover v. Stovall, 237 Ky 172, 35 SW 2d 24, 26 (1931).

The fact that Respondent was not at the time of her conviction actively engaged in teaching does not necessarily mean that she did not commit misconduct in office. In the present case, the Respondent was convicted of the misdemeanor offense of theft of government property, for using federal employees from her husband's congressional office to perform campaign functions for her, while those employees were supposed to be working in her husband's office. The amount of restitution which Respondent has been ordered by the Court to pay, $27,000.00 reflects the amount of employee "work" for which she personally and through her political campaign benefited. This violation of the federal law, which is characterized as a misdemeanor, constitutes both immorality and misconduct in office.

6. The Respondent argues that there is no "nexus" or connection between her conviction and her work as a teacher, and, for that reason, that no action can be taken by the Education Professional Standards Board. Respondent and all teachers serve as role models for students. Respondent's conviction of this misdemeanor demonstrates her disregard for the laws of the United States: Respondent participated in the misuse of federal employees, and she personally and her campaign benefited when the government paid employees to perform campaign duties for her campaign. This conduct sets a bad example for students, both as to theft generally, and, even more importantly in a country whose democratically-elected government relies on the fairness of its elections, as to how election campaigns should be conducted.

Appendix A

The case of Kenai Pen. Borough Bd. of Education v. Brown, 691 P 2d 1034 (Alaska 1984) presents a situation similar to that of this Respondent. There, a teacher was convicted of the misdemeanor offense of diverting electricity from a power company, by used of spliced wire to bypass the meter. Noting that an act of larceny or theft is commonly held to be an act of moral turpitude, the Court upheld the teacher's dismissal.

A misdemeanor conviction for theft related to a campaign for public office presents a much clearer nexus to a teaching certificate. In addition to a teacher serving as role model to students, a teachers are called upon to teach, at every level, subjects related to government and citizenship. Respondent's conviction of an election-related theft is necessarily related to her teaching certificate. There is sufficient nexus between Respondent's conviction and her work as a teacher for this Board to take action in this case.

7. The Education Professional Standards Board is justified in revoking the teaching certificate of the Respondent, Carol Brown Hubbard.

RECOMMENDATION

The Hearing Officer having made her Findings of Fact and Conclusions of Law, recommends to the Education Professional Standards Board the following decision:

That the teaching certificate of Carol Brown Hubbard (Kentucky Certificate No. 402-48-4266) should be revoked for a period of one year.

DATED THIS 15th day of February, 1995.

Appendix A

KENTUCKY EDUCATION
PROFESSIONAL STANDARDS BOARD

BY: s/ Mary-James Young
Mary-James Young, Hearing Officer

Appendix A

CERTIFICATE OF SERVICE

This is to certify that on this 15th day of February, 1995, a true copy of the foregoing Findings of Fact, Conclusions of Law, and Recommendation has been served upon the following:

Dr. Roland Goddu
Executive Secretary
Education Professional Standards Board
18th Floor, Capital Plaza Tower
500 Mero Street
Frankfort, KY 40601

Hon. Marcia Ford Seiler
Office of Legal Services
KY Department of Education
1st Floor, Capital Plaza Tower
500 Mero Street
Frankfort, KY 40601

Hon. Kyle T. Hubbard
2100 National City Tower
101 S. Fifth Street
Louisville, KY 40202

APPENDIX B — ORDER DENYING DISCRETIONARY REVIEW OF THE SUPREME COURT OF KENTUCKY ENTERED JANUARY 22, 1997

SUPREME COURT OF KENTUCKY
96-SC-1062-D
(95-CA-2056-MR)

FRANKLIN CIRCUIT COURT
95-CI-401

CAROL B. HUBBARD

MOVANT

V.

KENTUCKY EDUCATION PROFESSIONAL STANDARDS BOARD

RESPONDENT

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

Stephens, C.J., and Cooper, Lambert and Wintersheimer, JJ., all concur.

ENTERED January 22, 1997.

s/ Robert F. Stephens
Chief Justice